Supreme Court of the United States

October Term, 1974

No. 74-181

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Lands Commission, CITY OF LONG BEACH, a California Municipal Corporation, and CITY OF NEWPORT BEACH, a California Municipal Corporation,

Plaintiffs-Petitioners,

and

STATE OF LOUISIANA, *Plaintiff-Intervenor-Petitioner,*

vs.

JOHN C. SAWHILL, WILLIAM N. WALKER, WILLIAM C. ARNTZ, THE ADMINISTRATOR OF THE FEDERAL ENERGY OFFICE, THE DEPUTY ADMINISTRATOR OF THE FEDERAL ENERGY OFFICE, THE CHIEF COUNSEL OF THE FEDERAL ENERGY OFFICE, and THE REGIONAL ADMINISTRATOR, REGION 9, OF THE FEDERAL OFFICE OF OIL AND GAS,

Defendants-Respondents.

Petition by the State of California and the City of Long Beach for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

EVELLE J. YOUNGER,
Attorney General of California,
JAY L. SHAVELSON,
Assistant Attorney General,
WARREN J. ABBOTT,
Deputy Attorney General,
RICHARD A. HAFT,
Deputy Attorney General,
800 Ulshman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
Attorneys for Plaintiff and Petitioner State of California.

LEONARD PUTNAM,
City Attorney of Long Beach,
HAROLD A. LINGLE,
Deputy City Attorney,
ROBERT E. SHANNON,
Deputy City Attorney,
Suite 600, City Hall,
205 West Broadway,
Long Beach, Calif. 90802,
Attorneys for Plaintiff and Petitioner City of Long Beach.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
A. Preliminary Statement	2
B. Questions Presented	4
Considerations in Support of Granting Writ	4
Statutory and Regulatory Provisions Involved	5
A. Statutes	5
B. Regulations, Notices, Etc. (in Chronological Order)	5
Statement of the Case	6
A. Basis for Federal Jurisdiction in the District Court	6
B. Procedural Facts Material to the Consideration of the Questions Presented	6
C. Substantive Facts Material to the Consideration of the Questions Presented	9
Argument	14
Introduction	14
I	
The Amendment Purporting to Terminate the State and Local Exemption Was, in Effect, Issued Without Notice in Violation of Section 553 of the Administrative Procedure Act and Is Thus Not Enforceable	16

II Page

The Temporary Emergency Court of Appeals Erred in Finding That the Notice Issued by the Cost of Living Council on October 25, 1973, Could Be Relied Upon by the Federal Energy Office When It Purported to Revoke the State and Local Exemption on February 21, 1974 19

A. No Specific Reference to the Prior Notice Was Necessary to Terminate Its Legal Effectiveness 19

B. The Court of Appeals Erred in Holding That the Federal Energy Office Did Not Act Substantively in Reaffirming the State and Local Exemption .. 21

III

The Proceedings Were in Violation of the Administrative Procedure Act for the Further Reason That the Rule Purported to Take Effect as of the Date of Its Publication Rather Than the Date of Its Adoption 23

IV

The Attempt by the Federal Energy Office to Terminate the State and Local Governmental Exemption Was Unlawfully Retroactive .. 25

Conclusion 29

INDEX TO APPENDICES

Page

Appendix A. Opinion of Temporary Emergency Court of Appeals .....App. p. 1

Appendix B. Opinion of United States District Court for the Central District of California 22

Appendix C. Statutory and Regulatory Provisions Involved (Supreme Court Rule 23(1)(d)) 29

1. Economic Stabilization Act of 1970 as amended on December 22, 1971 (85 Stat. 744 et seq.) 29
2. Economic Stabilization Act Amendments of 1973 (87 Stat. 27) 56
3. The Emergency Petroleum Allocation Act of 1973 (87 Stat. 627) 61
4. Administrative Procedure Act Section 553 (8 U.S.C. § 553) 78
5. State and Local Exemption under Phase I Regulations (6 C.F.R. § 101.34(a)(2), 37 F.R. 5043, March 9, 1972) 80
6. State and Local Exemption under Phase IV Price Regulations (6 C.F.R. §§ 150.5(a)(2), and 150(f)(2), 38 F.R. 21601-21602, Aug. 9, 1973, and 38 F.R. 22119, Aug. 16, 1973) 81
7. Notice of Proposed Rulemaking of October 25, 1973 (38 F.R. 29618-29619, Oct. 26, 1973) 82
8. President's delegation of authority to FEO of December 4, 1973 (38 F.R. 33575-33576, Dec. 6, 1973) 86

Page

9. Price Regulations Promulgated by FEO on December 11, 1973 (38 F.R. 34433-34434, Dec. 13, 1973) 89

10. Delegation Order 47 (39 F.R. 24, January 2, 1974) 91

11. Price Regulations Adopted by FEO on December 27, 1973 (39 F.R. 761, Jan. 2, 1973) 94

12. Excerpts from Petroleum Allocation and Price Regulations Issued by the FEO on January 14, 1974 (Summary, and 10 C.F.R. Chapter II, §§ 205.201(a), 212.52(b), and 212. 74(a)-39 F.R. 1924, 1930 and 1952, Jan. 15, 1974) 96

13. Revocation of State and Local Exemption by FEO on February 21, 1974 (39 F.R. 7176-7177, Feb. 25, 1974) 100

14 Notice of Public Hearing Issued by FEO on March 5, 1974 (39 F.R. 8996-8997, Mar. 7, 1974) 105

15. Ruling on Removal of Exemption Issued by FEO on April 2, 1974 (39 F.R. 12252-12255, April 4, 1974) 109

TABLE OF AUTHORITIES CITED

Cases	Page
Fancher v. Clark, 127 F.Supp. 452 (D.C. Colo. 1954)	27, 28
Hoving Corp. v. F.T.C., 290 F.2d 803 (2d Cir. 1961)	21
Kelly v. U.S. Dept. of the Interior, 339 F.Supp. 1091 (E.D. Cal. 1972)	24
Mercantile Bank & Trust Co. v. United States, 441 F.2d 364 (8th Cir. 1971)	22
NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966)	25
N.Y. Foreign Freight etc. v. F.M.C., 337 F.2d 289 (5th Cir. 1961)	20, 21
Pacific Coast European Conference v. United States, 350 F.2d 197 (9th Cir. 1965)	16
SEC v. Chenery, 332 U.S. 194 (1947)	25
Texaco, Inc. v. Federal Power Commission, 412 F. 2d 740 (3d Cir. 1969)	16, 18
University of Southern California v. Cost of Living Council, 472 F.2d 1065 (T.E.C.A. 1972), cert. denied, 410 U.S. 928	28, 29
Woods v. Stone, 333 U.S. 472 (1948)	27, 28

Federal Register	
37 Federal Register, March 9, 1972, p. 5043	5, 9
38 Federal Register, Aug. 9, 1973, p. 21601	9
38 Federal Register, Aug. 9, 1973, pp. 21601-21602	5
38 Federal Register, Aug. 16, 1973, p. 22119	5, 9
38 Federal Register, Oct. 26, 1973, pp. 29618-29619	5, 9

Page

38 Federal Register, Dec. 6, 1973, pp. 33575-33576 5

38 Federal Register, Dec. 13, 1973, p. 34414 10

..... 10

38 Federal Register, Dec. 13, 1973, pp. 34433-34434 .....5, 9

39 Federal Register, Jan. 2, 1973, p. 744 10

39 Federal Register, Jan. 2, 1973, p. 761 .....5, 10

39 Federal Register, Jan. 2, 1974, p. 24 5

39 Federal Register, Jan. 15, 1974, p. 1924 .....

.....10, 11, 19

39 Federal Register, Jan. 15, 1974, pp. 1924, 1930, 1952 6

39 Federal Register, Jan. 15, 1974, pp. 1952, 1924 .....11, 17, 18, 19

39 Federal Register, Feb. 15, 1974, p. 7176 12

39 Federal Register, Jan. 15, 1974, p. 1930 16

39 Federal Register, Feb. 25, 1974, pp. 7176-7177

..... 6

39 Federal Register, Mar. 7, 1974, p. 8996 12

39 Federal Register, Mar. 7, 1974, pp. 8996-8997 6

39 Federal Register, April 4, 1974, pp. 12252-12255 .....6, 13

Federal Regulations

Code of Federal Regulations, Title 6, Sec. 101.34 (a)(2) 5

Code of Federal Regulations, Title 6, Sec. 150 (f)(2) 5

Page

Code of Federal Regulations, Title 6, Sec. 150.5 (a)(2) 5

Code of Federal Regulations, Title 6, Sec. 150.54 (a)(2) 9

Code of Federal Regulations, Title 6, Sec. 150.54 (f)(2) 9

Code of Federal Regulations, Title 6, Part 150 10

Code of Federal Regulations, Title 10, Ch. II, Sec. 205.201 16

Code of Federal Regulations, Title 10, Chapter II, Sec. 205.201(a) 6

Code of Federal Regulations, Title 10, Chapter II, Sec. 212.52(b) 6

Code of Federal Regulations, Title 10, Part 150 .. 10

Code of Federal Regulations, Title 10, Ch. II, Part 212 10

Code of Federal Regulations, Title 10, Ch. II, Part 212, Sec. 212.52(b) 11

Rules

Rules of the Supreme Court, Rule 23(1)(d) 5

Rules of the Supreme Court, Rule 24(5) 8

Statutes

Administrative Procedure Act, Sec. 553, 8 U.S.C. § 553 .....5, 16, 18, 23

Administrative Procedure Act, Sec. 664(d) 20

Economic Stabilization Act of 1970, Sec. 211, as amended, 85 Stat. 748-750 (1971) 6

Economic Stabilization Act of 1970, Sec. 211(2) as amended, 85 Stat. 750 (1971) 2

Page

Economic Stabilization Act of 1970 as amended on December 22, 1971, 85 Stat. 744 et seq. 5

Economic Stabilization Act Amendments of 1973, 87 Stat. 27 5

Emergency Petroleum Allocation Act of 1973, Sec. 4(a) 22

Emergency Petroleum Allocation Act of 1973, 87 Stat. 627 .....5, 10

Emergency Petroleum Allocation Act of 1973, Sec. 5(a)(1), 87 Stat. 627 (1973) 2, 6

Public Law, Sec. 5(a), pp. 93-159 16

United States Code, Title 5, Sec. 553 16

United States Code, Title 5, Sec. 553(b)(3) 18

United States Code, Title 5, Sec. 553(c) 20

United States Code, Title 5, Sec. 533(d) 13

United States Code, Title 5, Sec. 553(d)(3) 24

United States Code, Title 28, Sec. 1254(1) 2

Textbooks

Davis, Administrative Law Treatise (1958), Sec. 5.08, pp. 340-41 26

85 Statutes at large, Sec. 207(a), p. 747 16

87 Statutes at Large, p. 627 22

2A Sutherland, Statutory Construction (Rev. 3d ed. 1973), Sec. 4508, p. 24 22

9 Wright and Miller, Federal Practice and Procedure (1971 ed.), Sec. 2587, pp. 740-749 20

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-171

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Lands Commission, CITY OF LONG BEACH, a California Municipal Corporation, and CITY OF NEWPORT BEACH, a California Municipal Corporation,
Plaintiffs-Petitioners,

and

STATE OF LOUISIANA,
Plaintiff-Intervenor-Petitioner,

vs.

JOHN C. SAWHILL, WILLIAM N. WALKER, WILLIAM C. ARNTZ, THE ADMINISTRATOR OF THE FEDERAL ENERGY OFFICE, THE DEPUTY ADMINISTRATOR OF THE FEDERAL ENERGY OFFICE, THE CHIEF COUNSEL OF THE FEDERAL ENERGY OFFICE, and THE REGIONAL ADMINISTRATOR, REGION 9, OF THE FEDERAL OFFICE OF OIL AND GAS,
Defendants-Respondents.

Petition by the State of California and the City of Long Beach for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

Petitioners State of California acting by and through its State Lands Commission, hereinafter referred to as the State of California, and and City of Long Beach, pray that a writ of certiorari be issued to review the judgment of the Temporary Emergency Court of Appeals of the United States entered in *People of the State of California, et al. v. William E. Simon, et al.* on July 26, 1974, and the Opinion of said Court filed on August 12, 1974, case number 9-12.

Opinions Below

The opinion of the Temporary Emergency Court of Appeals is as yet unpublished and is attached hereto as Appendix A. The opinion of the United States District Court for the Central District of California is also unpublished and is attached hereto as Appendix B.

Jurisdiction

The judgment of the Temporary Emergency Court of Appeals was originally entered on July 26, 1974. The Opinion in support of said judgment was filed on August 12, 1974. A Petition for Rehearing was mailed on August 9, 1974, but has not as yet been acted upon. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1); section 211(2) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750 (1971); and section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627 (1973).

Questions Presented for Review

A. Preliminary Statement

Because of the unique character of this case, a short general summary of the facts is necessary to convey the significance of the specific question presented for review.

On October 25, 1973, the Cost of Living Council, acting under the authority of the Economic Stabilization Act of 1970, as amended, issued a Notice of Proposed Rule Making. This Notice proposed that if and when adopted, the State and local exemption from Federal price ceilings imposed upon petroleum products (including crude oil) would be terminated *not* as of the date of the adoption of the rule, but as of the date of the proposal (*i.e.*, October 25, 1973). After

the closing date for comment on the proposal, but before any action thereon by the Cost of Living Council, the Petroleum Allocation Act of 1973 was enacted and the authority to regulate the price of petroleum products was transferred from the Cost of Living Council to the Federal Energy Office (now the Federal Energy Administration), hereinafter sometimes referred to as the "FEO." On December 11, 1974, the FEO announced its intent to maintain in effect the price regulations (including the State and local exemption) issued by the Cost of Living Council, and on December 27, 1974, actually adopted regulations having this effect. On January 14, 1974, the FEO adopted new regulations, which stated expressly that sales of "covered products" (including crude oil) by State and local governments were exempt, and also stating that no future specific changes in the regulations were then currently anticipated. Nevertheless, about five weeks later, on February 21, 1974, the FEO, without further notice, and purporting to act pursuant to the Notice of Proposed Rule Making issued by the Cost of Living Council on October 25, 1973, purported to terminate the State and local exemption retroactively to October 25, 1973. As will be discussed in more detail below, the oil pricing picture had changed dramatically between the date of the original proposal (and the ending date of comment thereon) and February 21, 1974 (the date of the purported termination of the exemption), including such factors as a three-fold increase in the difference between ceiling and exempt prices, a growth in the total differential between ceiling and exempt prices of about $60 million in California alone, and reliance by public agencies on the fact that the original notice had apparently become a nullity.

B. Questions Presented

1. Whether, under the aforesaid circumstances, the Federal Energy Office had already terminated the rule making process commenced by its predecessor, the Cost of Living Council, when it purported to terminate the exemption on February 21, 1974, pursuant to the Notice issued by the Cost of Living Council on October 25, 1973.

2. If the answer to the first question is affirmative, was the purported termination of the State and local governmental exemption void as having been issued without notice and without statement of good cause for lack thereof in violation of the Administrative Procedure Act?

3. Was the purported termination of the State and local governmental exemption unlawfully retroactive?

Considerations in Support of Granting Writ

1 The issues here involved are of great national importance since their resolution will affect the public revenues of Petitioners in an amount exceeding some quarter of a billion dollars.

2. It is essential that this Court review the actions of the Federal Energy Office, as condoned by the Temporary Emergency Court of Appeals, to guarantee that the legal rights of those affected, especially the rights of sovereign states, are not callously disregarded on the pretext that such rights are outweighed by the national energy crisis.

3. The decision of the Temporary Emergency Court of Appeals is in conflict with the decisions of this Court and other Federal Courts in its interpretation of the fundamental rights conferred upon those affected by administrative regulations under the Administrative Procedure Act.

Statutory and Regulatory Provisions Involved[1]

A. Statutes

1. Economic Stabilization Act of 1970 as amended on December 22, 1971 (85 Stat. 744 *et seq.*)
2. Economic Stabilization Act Amendments of 1973 (87 Stat. 27).
3. The Emergency Petroleum Allocation Act of 1973 (87 Stat. 627).
4. Administrative Procedure Act Section 553 (8 U.S.C. § 553).

B. Regulations, Notices, Etc. (in Chronological Order):

5. State and Local Exemption under Phase I Price Regulations (6 C.F.R. § 101.34(a)(2), 37 F.R. 5043, March 9, 1972).
6. State and Local Exemption under Phase IV Price Regulations (6 C.F.R. §§ 150.5(a)(2), and 150(f)(2), 38 F.R. 21601-21602, Aug. 9, 1973, and 38 F.R. 22119, Aug. 16, 1973).
7. Notice of Proposed Rulemaking of October 25, 1973 (38 F.R. 29618-29619, Oct. 26, 1973).
8. President's delegation of authority to FEO of December 4, 1973 (38 F.R. 33575-33576, Dec. 6, 1973).
9. Price Regulations Promulgated by FEO on December 11, 1973 (38 F.R. 34433-34434, Dec. 13, 1973).
10. Delegation Order 47 (39 F.R. 24, January 2, 1974).
11. Price Regulations Adopted by FEO on December 27, 1973 (39 F.R. 761, Jan. 2, 1973).

---

[1]These are set forth separately in Appendix C hereto pursuant to Supreme Court Rule 23(1)(d).

12. Excerpts from Petroleum Allocation and Price Regulations Issued by the FEO on January 14, 1974 (Summary, and 10 C.F.R. Chapter II, §§ 205.201(a), and 212.52(b))—39 F.R. 1924, 1930, and 1952, Jan. 15, 1974).
13. Revocation of State and Local Exemption by FEO on February 21, 1974 (39 F.R. 7176-7177, Feb. 25, 1974).
14. Notice of Public Hearing Issued by FEO on March 5, 1974 (39 F.R. 8996-8997, Mar. 7, 1974).
15. Ruling on Removal of Exemption Issued by FEO on April 2, 1974 (39 F.R. 12252-12255, April 4, 1974).

Statement of the Case

A. Basis for Federal Jurisdiction in the District Court

The subject suit was commenced in the United States District Court for the Central District of California on March 13, 1974. Federal jurisdiction was invoked pursuant to the provisions of section 211 of the Economic Stabilization Act of 1970, as amended, 85 Stat. 748-750 (1971), and section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627 (1973).

B. Procedural Facts Material to the Consideration of the Questions Presented

The subject action was commenced by Petitioners on March 13, 1974, in the United States District Court in and for the Central District of California, for the purpose of enjoining the Federal Energy Office and its chief officials from enforcing as against Petitioners the crude oil price ceilings set forth in the regulations issued by that agency. On March 20, 1974, the District

Court issued a Temporary Restraining Order prohibiting such enforcement, and after a consolidated proceeding on preliminary injunction and final hearing on the merits, the District Court ruled in favor of Petitioners. The District Court's Opinion, issued on May 1, 1974, is attached as Appendix "B" hereto, and its Judgment, Findings of Fact and Conclusions of Law were entered on May 28, 1974. The Judgment, in addition to enjoining the defendant officers of the Federal Energy Office, temporarily restrained Petitioners from taking action to compel payments from its customers over ceiling price, while allowing them to accept voluntary payments. Defendants filed a timely Notice of Appeal to the Temporary Emergency Court of Appeals which, despite Petitioners' offer to maintain the temporary restraint in effect until final disposition of the appeal, issued an *ex parte* stay order forbidding Petitioners from accepting *any* payments over ceiling from its customers, voluntary or involuntary.

The essential determinations by the District Court were (1) that the proceeding to revoke the State and local exemption, commenced by the Cost of Living Council on October 25, 1973, had terminated as a matter of law prior to the purported action pursuant thereto by the Federal Energy Office on February 21, 1974, by reason of the intervening adoption of that exemption, expressly and by reference, and hence that the purported revocation of the exemption was invalid as being without notice in violation of the Administrative Procedure Act; and (2) that the purported revocation was unlawfully and needlessly retroactive.

The Temporary Emergency Court of Appeals heard oral argument on this matter on July 26, 1974. In an

unusual departure from normal procedures, the Court, after a short recess, announced and entered its judgment and mandate reversing the District Court on the very day of argument, stating that a written Opinion would follow. This opinion was not actually filed until August 12, 1974, and was not received by Petitioners until August 15. The effect of the procedure was to shorten the time within which Petitioners could actually prepare, print and file this Petition (already shortened by statute to 30 days) to about 11 days. Petitioners, hoping and expecting to receive the Court's Opinion within a few days after entry of judgment, waited the full 14 days after such entry to file a petition for rehearing. Despite the almost insuperable difficulties imposed upon Petitioners by the procedure adopted by the Temporary Emergency Court of Appeals and despite the pendency of the Petition for a Rehearing, Petitioners are making every effort possible to file this Petition within 30 days after entry of judgment, first to avoid any ambiguity as to the timeliness of their filing and secondly because the differential between ceiling and free market price is causing deficiency revenues claimed by Petitioners to accumulate at the rate of about $1,000,000 per day. However, because of the artificially shortened time period available to Petitioners, some or all of them may wish to file supplemental argument with this Court pursuant to Supreme Court Rule 24(5). The supervening event justifying any such supplemental brief would be the opportunity to study more carefully the Opinion of the Temporary Emergency Court of Appeals, and cite additional authorities contrary to the conclusions reached therein.

C. Substantive Facts Material to the Consideration of the Questions Presented

Under regulations originally published by the Cost of Living Council on March 9, 1972 (37 F.R. 5043), State and local governmental entities have been held exempt from price ceilings applicable to sales of crude oil. During the period of applicability of the Phase IV price regulations to crude oil and other petroleum products, this exemption was continued in 6 CFR sections 150.54(a)(2) (38 F.R. 21601, August 9, 1973) and 150.54(f)(2) (38 F.R. 22119, August 16, 1973).[2]

The basic issue herein is the legal validity of an amendment to regulations adopted by the Federal Energy Office on February 21, 1974, which purports to terminate retroactively the State and local exemption with regard to prices charged for crude oil. The background to the present controversy may be summarized as follows:

On October 25, 1973, the Cost of Living Council, acting under the Economic Stabilization Act, issued a notice of proposed rule making (38 F.R. 29618-619, October 26, 1973) proposing to amend Title 6 of the Code of Federal Regulations so as to terminate the State and local exemption retroactively to the date of the notice. This notice specified that the ending date for comment on the proposed rule was November 24, 1973. The State of California and the City of Long Beach filed comments opposing said rule and the State promptly sought a formal hearing. Record on Appeal, pages 51-52, 87-96, and 108, lines 2-4.

---

[2]Any ambiguity in the language contained in these regulations is resolved by interpretations by the officials charged with enforcement of the Economic Stabilization Act of 1970 set forth at pages 31, 33-34, 36, and 47-48 of the Record on Appeal.

On November 27, 1973, the President approved the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627 (1973). Said Act specifically required the President to promulgate and adopt a new regulation relating to the mandatory allocation of crude oil and the pricing thereof. The Cost of Living Council never took any action pursuant to its notice of October 25, 1973. By Presidential Order of December 4, 1973 (38 F.R. 33575-576, December 6, 1973), the authority to issue the regulation required by the Petroleum Allocation Act was delegated to the Federal Energy Office.

On December 11, 1973, the Federal Energy Office promulgated the regulation required by the Petroleum Allocation Act (38 F.R. 34414 *et seq.*, December 13, 1973), and said regulation was adopted on December 27, 1973 (39 F.R. 744, *et seq.*, January 2, 1973). The regulation, both as proposed (38 F.R. 34433-434) and adopted (39 F.R. 761), incorporated by reference into Title 10 of the Code of Federal Regulations the pricing provisions (including the State and local exemption) previously set forth in Part 150 of Title 6 of the Code [*i.e.*, the Phase IV Price Regulations adopted by the Cost of Living Council).

By regulations adopted on January 14, 1974 (39 F.R. 1924, *et seq.*, January 15, 1974), the Federal Energy Office made substantial changes in its regulation of December 27, 1973. These new regulations included the adoption of 10 C.F.R. Chapter II, Part 212, which set forth in full the pricing provisions applicable

to crude oil and other petroleum products. Section 212.52(b) of Part 212 (39 F.R. 1952) expressly stated that:

> "Prices charged for any sale, lease or lease-sale of a covered product [including crude oil] by State and local governments are exempt."

The summary preceding the January 14 regulations (39 F.R. 1924) stated ". . . no specific future changes [in the regulations] are currently anticipated," but did invite comments upon the entire complex system for allocation and pricing set forth in the regulations.

As shown by the affidavits filed herein (Affidavit of E. N. Gladish, Record on Appeal, pp. 52-56; Affidavit of John R. Mansell, Record on Appeal, p. 108; Affidavit of Frank C. Ivens, Record on Appeal, p. 115; Affidavit of Joseph E. Berrigan, Jr., Record on Appeal, pp. 139-41), the foregoing events caused Petitioners to assume that the notice of proposed rule making issued by the Cost of Living Council on October 25, 1973, was no longer operative, and that the Federal Energy Office had made a final decision to retain the State and local exemption. They realized that the exemption, like any other provision in the regulations, might be modified or terminated by the Federal Energy Office in the future. However, they relied heavily on the fact that such termination could take place *only* after further notice, and certainly not retroactively to a date prior to such notice. Furthermore, as shown in said affidavits at the pages of the Record hereinabove cited, the changes in circumstances between November

24, 1973, and February 21, 1974, were such as to render obsolete any comments made pursuant to the notice of October 25, 1973. These changes included the rise of the differential between ceiling and exempt prices from $1.65 to $5.00, the enactment of the Emergency Petroleum Allocation Act of 1973, the promulgation and adoption of a complex and interrelated scheme of pricing and allocation, and the transfer of authority over crude oil pricing from the Cost of Living Council (acting under the Economic Stabilization Act) to the Federal Energy Office (acting under the Emergency Petroleum Allocation Act).

Nevertheless, the Federal Energy Office, on February 21, 1974, purporting to act pursuant to the notice of proposed rule making issued by the Cost of Living Council, suddenly revoked the State and local exemption without further notice. Even more startling, said revocation was made retroactively to October 25, 1973, the date of said "Notice." 39 F.R. 7176, February 15, 1974. Neither the original Notice of October 25, 1973, nor the regulation purportedly adopted pursuant thereto on February 21, 1974, contained any statement as to why the revocation of the exemption should take effect as of the date of the Notice rather than the date of the purportedly adopted rule.

On March 5, 1974 (39 F.R. 8996, March 7, 1974), the Federal Energy Office issued a notice that it would receive comments from interested persons on whether or not the Office should reconsider the amendment of February 21, 1974. This notice was based on the as-

sumption that said amendment had been validly adopted pursuant to the Notice of Proposed Rulemaking issued on October 25, 1974. The March 5 Notice was published in the Federal Register on March 7, 1974, and announced that a public hearing would be held in Washington, D.C. on March 13, 1974, and that written submissions would be received until March 15, 1974. Any person wishing to testify was required to furnish a concise summary of his presentation, plus other information, before noon of March 12, 1974.

On April 2, 1974 (39 F.R. 12252-12255, April 4, 1974), the Federal Energy Office issued its decision on the March 13, 1974 hearings. Basically the decision was to re-confirm the February 21 amendment with slight modifications. The April 2 ruling was issued less than 30 days after the notice of March 5, 1974, and contained no statement of good cause, nor any explanation why the 30 day notice provision required by the Administrative Procedure Act (5 U.S.C. § 553(d)) was not complied with.

ARGUMENT

INTRODUCTION

The decisive issue in this case is the fundamental fairness and legality of the procedures adopted by the Cost of Living Council and the Federal Energy Office in revoking the State and local government exemption from Federal ceiling prices imposed upon sales of crude oil and other products.

The procedure which was held unlawful by the United States District Court and condoned by the Temporary Emergency Court of Appeals was uniquely harsh and unfair in the following respects:

1. The Cost of Living Council in its notice of proposed rule making stated that the revocation of the State and local exemption would take place *not* when and if the rule was *adopted,* but as of the date of the *proposal.* This meant that for an indefinite period (ultimately four months), neither the public entities nor their customers had any way of knowing the correct prices to charge or to pay for publicly sold crude oil. The enormity of the effect of this uncertainty is illustrated by the fact that at the date of filing of the Complaint (about three weeks after the announcement of the revocation), the difference between ceiling prices and free market prices was such as to cause a disparity of $64 million in California alone, which disparity was growing at a rate of $600,000 per day. Record on Appeal, page 28.

2. Petitioners were expected to perceive that the Cost of Living Council notice was still in effect despite the following facts, all of which occurred during the three months *after* the closing date for comment specified in the notice:

a. The enactment of the Emergency Petroleum Allocation Act of 1973, which mandated a new, interrelated program for the allocation and pricing of petroleum;

b. A three-fold increase in the disparity between ceiling and exempt prices, which meant that public entities would receive less than one-half the free market price for their oil, were their exemption terminated;

c. The transfer of pricing authority over crude oil from the Cost of Living Council to the Federal Energy Office, an agency having different statutory authority and responsibility;

d. The promulgation and adoption by the Federal Energy Office of regulations continuing in effect the exemption previously contained in the Cost of Living Council regulations;

e. The adoption by the Federal Energy Office on January 14, 1974, of regulations setting forth in new and express language the existence of the State and local governmental exemption, and the statement that no specific changes in these regulations were then currently anticipated.

f. Detrimental reliance by Petitioners upon the apparent decision by the Federal Energy Office to continue the exemption, or at least not to revoke it retroactively and without further notice.

The harshess and unfairness of this procedure would be serious enough to invalidate it if the Federal agency had been dealing with private entities. The procedure is simply intolerable when applied to states, which are endowed with sovereign powers and are charged with the responsibility of protecting the interests of their citizens.

I

The Amendment Purporting to Terminate the State and Local Exemption Was, in Effect, Issued Without Notice in Violation of Section 553 of the Administrative Procedure Act and Is Thus Not Enforceable

Section 553 of the Administrative Procedure Act (5 U.S.C. § 553) is made expressly applicable to rule making by the Federal Energy Office ("FEO") under the Economic Stabilization Act (85 Stat. 747, § 207 (a)), the Petroleum Allocation Act (Public Law 93-159, § 5(a)), and the rules and regulations adopted by said Office (10 C.F.R., Chapter II, § 205.201, 39 F.R. 1930, Jan. 15, 1974). In pertinent part, section 553 requires that notice of proposed rule making shall be published in the Federal Register; that the required publication be made not less than 30 days before the effective date of a rule; and that after the notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written or oral data, views, or arguments. As stated in *Texaco, Inc. v. Federal Power Commission,* 412 F.2d 740, 744 (3d Cir. 1969):

> "Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated. . . ."

See also, Pacific Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir. 1965).

Under the circumstances here involved, it cannot be said that Petitioners were given any meaningful opportunity to participate in the adoption of the amendment of February 21, 1974, which has a drastic effect upon Petitioners and their citizens. Furthermore, the procedure adopted was such that the FEO was deprived of meaningful comment by Petitioners, who benefit from the exemption, while it, in effect, invited comment from opponents, thus failing to educate itself on both sides of the issue. Plaintiffs duly filed their comments prior to November 24, 1973, as ostensibly required by the notice of October 25, 1973, assuming that the Cost of Living Council would act soon thereafter on the basis of the situation as it then existed. When the functions of the Council (acting under the Economic Stabilization Act) with regard to crude oil were transferred to the Federal Energy Office (acting under the Petroleum Allocation Act), without any action having been taken by the Council, plaintiffs had at least a reasonable doubt that the former notice was still operative. When the FEO on three occasions indicated its intent to retain the exemption, plaintiffs had every reason to believe that the prior notice (if operative at all) had been disposed of favorably, from their standpoint. Thus, they had no occasion to comment to the FEO in the context of the vitally important events occurring after November 24, 1973. (*See* paragraph 26 of the Complaint, Record on Appeal pp. 16-17). This fact is most dramatically illustrated by the regulations adopted by the FEO on January 14, 1974. These regulations expressly stated that "Prices charged . . . by State and local governments are exempt," and that "no specific future changes [in the January 14 regulations] are currently anticipated." (*See* 39 F.R. 1952

and 1924, Jan. 15, 1974.) Nevertheless, comments "which might assist in future improvements to the program" were solicited. The "program" set forth in the regulations consists of 36 closely written pages relating to administrative procedures, general allocation and price rules, mandatory petroleum allocation, and mandatory petroleum price regulations. The invitation for comment was clearly not intended as a notice of proposed rule making since it does not even purport to set forth the terms or substance, or description of any proposed rule, as required by the Administrative Procedure Act. (*See* 5 U.S.C. § 553(b)(3)). The invitation was in fact a solicitation of comment by those critical of any aspect of the regulations, upon which *future* specific notices might be based. There was no occasion for persons, such as plaintiffs, to comment upon any aspect of the regulations with which they were satisfied. It was perfectly proper for persons opposed to the exemption to submit adverse comment and for the FEO to receive such comment. However, it was totally *improper* for the FEO to act upon such comment without giving any further notice, as it purported to do on February 21, 1974, when it attempted to revoke the exemption.

For the aforesaid reasons, the amendment of February 21, 1974, cannot be considered to have been issued in accordance with the spirit or intent of section 553 of the Administrative Procedure Act, and must be deemed unenforceable against the plaintiffs, who suffered special injury by reason of the procedures adopted. *Cf. Texaco, Inc. v. Federal Power Commission, supra,* 412 F.2d at 745-46.

II

The Temporary Emergency Court of Appeals Erred in Finding That the Notice Issued by the Cost of Living Council on October 25, 1973, Could Be Relied Upon by the Federal Energy Office When It Purported to Revoke the State and Local Exemption on February 21, 1974

A. No Specific Reference to the Prior Notice Was Necessary to Terminate Its Legal Effectiveness

At page 13 of its Opinion (Appendix "A" hereto), the Temporary Emergency Court states that Petitioners' chief basis for contending that the proceedings commenced on October 25, 1973, had terminated prior to the February 21, 1974, revocation of the exemption, was the express adoption of the exemption by the Federal Energy Office on January 14, 1974 (39 F.R. 1952, Jan. 15, 1974) accompanied by the statement that "no specific future changes [in the regulations] are currently anticipated" (39 F.R. 1924). The Court then states that Petitioners were not entitled to rely upon the January 14, 1974 regulations as terminating the proceedings commenced by the Cost of Living Council on October 25, 1973, because these regulations contained no discussion of the exemption and did not incorporate a general statement of the purpose of the exemption.

The Court of Appeals has greatly oversimplified Petitioners' contentions in this regard. We do *not* rely upon the statements contained in the January 14, 1974, in a vacuum, but rather in the context of *all* the events occurring after the closing date for comment on the October 25, 1973 notice (*i.e.*, November 24, 1973), as outlined in the Introduction to the Argument (*supra*, pp. "A"). We shall discuss below the legal

propriety of a procedure announcing that the effective date of a rule will be the date of *notice* rather than the date of *adoption*. However, even if such procedure *were* legally proper, it was inconceivable to Petitioners that the Federal Energy Office intended to perpetuate a situation of complete chaos and uncertainty as to prices chargeable for crude oil for a period of *four months* under the circumstances hereinabove set forth. The District Court ruled that under all these circumstances, Petitioners *were* entitled to assume that the proceedings for revocation had terminated. *See* Findings of Fact Numbers 22-25, inclusive, Record on Appeal, pages 178-179. Under the "clearly erroneous" rule, now deemed applicable in the Federal Courts even where the evidence is documentary and uncontradicted [9 Wright and Miller, *Federal Practice and Procedure* 740-749, § 2587 (1971 ed.]), the Temporary Emergency Court of Appeals must be deemed bound by this determination.

In support of the proposition that Petitioners should have been aware that the Federal Energy Office did not intend to take any action pursuant to, or which would supersede, the notice of proposed rule making issued by the Cost of Living Council, the Court of Appeals Opinion (footnote 20, p. 13) cites section 664(d) of the Administrative Procedure Act, 5 U.S.C. § 553(c). This section states in part that ". . . After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . ." However, the omission of any such statement cannot be deemed to have put Petitioners on notice that the proposal was still in effect since the courts have been extremely tolerant in reviewing this requirement. *See, e.g., N.Y. Foreign Freight etc. v. F.M.C.*, 337 F.2d

289, 296 (5th Cir. 1961) (sustaining a regulation, such as those here involved, containing a mere general statement that the regulation was designed to achieve the objectives of the authorizing statute); and *Hoving Corp. v. F.T.C.*, 290 F.2d 803, 807 (2d Cir. 1961) (allowing the entire *omission* of any such statement where such would be superfluous). It would appear that the latter case is clearly applicable to the pricing regulations promulgated and adopted prior to February 21, 1974, since these regulations showed only the intent to continue the former exemption. Thus, the reasons for its original adoption (*i.e.*, a reluctance to interfere with the affairs of sovereign states) would make any further statement superfluous.

B. The Court of Appeals Erred in Holding That the Federal Energy Office Did Not Act Substantively in Reaffirming the State and Local Exemption

From the foregoing, it can be perceived that the fair and reasonable interpretation of the acts of the Federal Energy Office prior to February 21, 1974, was that the Office had determined, at least for the present, to retain the State and local exemption. At pages 13-14 of its Opinion, the Court of Appeals relies heavily on the fact that on February 21, when the Federal Energy Office purported to revoke the exemption, it stated that it had had no such substantive intent. Petitioners contend that the *actual* intent of the Office, as later revealed, cannot change the legal effect of those acts when they occurred. As stated by the leading authority on statutory construction:

> ". . . the policy favoring conventional meanings and probable general understandings over obscurely evidenced real intention of legislators [and presumably administrators] is supported . . . in

> the oft-repeated premise that the intention must be determined primarily from the language of the statute itself."
>
> 2A Sutherland, *Statutory Construction*, § 4508, page 24 (Revised 3d ed., 1973).

See also, Mercantile Bank & Trust Co. v. United States, 441 F.2d 364, 366 (8th Cir. 1971). Stated otherwise, although administrative interpretation may be decisive as to *future* interpretation of statutes and regulations, it cannot be used to alter the plain meaning of earlier actions, especially where, as here, there has been detrimental reliance on such plain meaning.

Further evidence that the pricing provisions adopted by the Federal Energy Office prior to February 21, 1974, must be given substantive effect is found in the provisions of the Emergency Petroleum Allocation Act of 1973 (87 Stat. 627). Under section 4(a) of said Act, the regulation promulgated on December 11, 1973, and adopted on December 27, was *required* to provide for the mandatory allocation of crude oil "at prices specified in (or determined in a manner prescribed by)" such regulation. We submit that the defendants cannot now argue that the pricing provisions were inserted in this regulation (and in the regulation adopted on January 14, 1974) merely in *colorable* compliance with the statutory mandate, and that the only pricing provision intended to have any substantive effect was that adopted on February 21.

If, as we have demonstrated, the pricing provisions originally adopted by the Federal Energy Office must be given substantive effect, it follows that these provisions could only be modified by a *new* regulation after a *new* notice as required by the Administrative Procedure Act.

III

The Proceedings Were in Violation of the Administrative Procedure Act for the Further Reason That the Rule Purported to Take Effect as of the Date of Its Publication Rather Than the Date of Its Adoption

The Administrative Procedure Act (8 U.S.C. § 553 (d)) provides that

> "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
>
> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule."

In this case, neither the original notice nor the rule purportedly adopted pursuant thereto contains any finding of good cause. Nevertheless, the rule purports to take effect as of the date of the publication of the original notice. The Court of Appeals Opinion (at pp. 19-20) recognizes this defect, but states that the error was not prejudicial because "the cogent reasons for the withdrawal of the exemption as of the date of the initial notice were quite obvious. Under such circumstances any flaw was at most purely technical, being neither prejudicial nor invalidating." We strongly controvert this statement.

The fact that the Federal Energy Office, by its own admission, regarded this as a matter of secondary importance and waited four months after the issuance of the initial Notice before taking any action indicates a

lack of urgency. Even accepting the Court of Appeal's conclusion that the Notice stayed in effect during this entire period, the exemption was also allowed to remain in effect since no action was taken pursuant to the Notice. As previously stated, the principal impact of the Notice during the period it was considered to be in effect was to place both the buyers and sellers of crude oil in a serious dilemma as to whether to pay or charge the ceiling or the free market price for oil. If, as the Court of Appeals has held, the FEO was empowered to continue this uncertainty for a period of four months, during which the total differential grew to $60 million and both the public and private entities had to make fiscal decisions of permanent significance, the Courts will have sanctioned an exercise of Federal authority in a manner which is simply intolerable.

We submit that under these circumstances, the need to terminate the exemption as of the date of the Notice was far from "obvious", and the failure to state any justification for this procedure was clearly "prejudicial." The courts have recognized that administrative agencies may often be tempted to circumvent the basic purpose of the Administrative Procedure Act by issuing rules without prior notice. Thus the provisions of section 553(d)(3) have been strictly construed. For example, in *Kelly v. U.S. Dept. of the Interior*, 339 F.Supp. 1091, 1101 (E.D .Cal. 1972), the Court held that not only must the rule contain an express statement of reasons why the 30 day requirement is either impracticable, unnecessary, or contrary to the public interest, but also that such statement must be sufficiently specific to allow the court to measure the propriety of ignoring the 30-day rule.

IV

The Attempt by the Federal Energy Office to Terminate the State and Local Governmental Exemption Was Unlawfully Retroactive

At page 19 of the Opinion, the Court of Appeals cites the case of *SEC v. Chenery*, 332 U.S. 194 (1947) for the proposition that a retroactive rule is invalid, generally speaking, only if unreasonable. Without repeating former arguments, we submit that four months of retroactivity under the present circumstances was clearly unreasonable. Furthermore, this Court should take into consideration the later comment upon the *Chenery* decision by a distinguished Federal Judge. In *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2nd Cir. 1966) Judge Friendly, speaking on the issue of retroactivity, stated:

> "There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, SEC v. Chenery Corp., 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 90 L.Ed. 1995 (1947), that since an administrative agency has 'the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct', and that the 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.' [Citations omitted] [Footnotes omitted]".

Professor Davis, perhaps the country's leading authority on administrative law, notes that the courts in

most instances have given only prospective application to administrative rule making. In this connection, the following discussion appears in Davis, *Administrative Law Treatise*, § 5.08 at 340-41 (1958).

> "Since legislative rules are merely the administrative counterpart of statutes, the argument is plausible that legislative rules may be retroactive whenever a statute may be retroactive, since the fairness or unfairness is the same and judicial ideas of fairness are decisive. But agencies have no powers except those conferred and power to issue retroactive rules is not easily implied. State courts readily hold that retroactive rate orders are invalid for lack of statutory authority. And courts are less reluctant to upset mere administrative regulations than to upset statutes. Because retroactivity is not favored, a reasonable initial view is that retroactive rules should be tolerated only when specifically authorized by statute." [Footnotes omitted].

Recognizing the strong judicial prejudice against retroactive rule making, the Court of Appeals states (at pp. 17-18 of its Opinion) that no true retroactivity was here involved because the notice of proposed rule making originally issued by the Cost of Living Council announced that the rule, when and if adopted, would take effect as of the date of the notice. We have previously shown that such a procedure is barred by the Administrative Procedure Act. We have also shown that such a procedure, especially when prolonged over a substantial period of time during which massive changes were taking place in the entire pricing structure, involves all the evils of normal retroactivity. In

footnote 27 at page 19 of its Opinion the Court cites three cases for the proposition that this prior announcement rendered all prices charged during the period of uncertainty (October 25, 1973, to February 21, 1974) as "conditional", and therefore subject to lawful change by the regulatory agency. Two of these cases [*Woods v. Stone*, 333 U.S. 472 (1948), and *Fancher v. Clark*, 127 F.Supp. 452 (D.C. Colo. 1954)] involved a rent control provision requiring a landlord to register with the control authority, and subjected him to retroactive roll back of his rentals over a prolonged period if he failed to register. The Supreme Court rejected the argument that this was retroactive law making, using the following language (337 U.S. at 477-478):

> ". . . This is not the case of a new law reaching backwards to make payments illegal that were free of infirmity when made. By legislation and regulation in force before the collections were made, *the landlord's own default in registering had rendered these payments conditional*, subject to revision and to refund. Readjustment under these conditions cannot be said to be retroactive law making." (Emphasis added).

The District Court in the *Fancher* case (127 F.Supp. at 457) relied upon the above quoted language of the Supreme Court decision. These cases, rather than supporting the Court of Appeals' conclusion, demonstrate the limitations of the doctrine of "conditional" payments which are subject to lawful readjustment. Petitioners' sales of crude oil during the period of uncertainty were clearly lawful and proper under the regulations as they then existed. A mere *proposal* to change the law cannot be given the substantive effect of rendering unlawful payments made contrary to said pro-

posal. Thus, Petitioners' situation is entirely different from that of the landlords in *Woods* and *Fancher*, who subjected themselves to retroactive roll back by reason of their disobedience of laws in effect at the time the rentals were charged.

The third case cited by the Court of Appeals in support of the proposition that transactions occurring during the period of uncertainty were subject to retroactive readjustment is *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (T.E.C.A. 1972), *cert. denied*, 410 U.S. 928. In that case the Temporary Emergency Court of Appeals upheld an order by the Cost of Living Council forcing the University to repay customers a portion of the cost of football tickets purchased prior the imposition of the Presidential "Price Freeze" for games played during the period of the "Freeze." That case is distinguishable from the present in that the "transaction" was not completed (*i.e.*, the game had not been played) at the time the order was imposed. Here petitioners' sales of crude oil were completed in their entirety prior to February 21, 1974. We do recognize, however, certain similarities between the *Southern California* case and the present, in that in both the regulatory agency imposed an extremely harsh (and we believe, unfair) burden upon the seller, which was found by the United States District Court to be unlawfully retroactive, but which the Temporary Emergency Court of Appeals found to be justified by the existence of emergency conditions. This Court denied certiorari in the *South-*

ern California case. However, Petitioners respectfully submit that the time has come for this Court to take notice of the harsh and almost shocking regulatory measures which the Temporary Emergency Court of Appeals has found to be lawful during the current economic difficulties, and determine whether these measures can truly be justified in law and in equity.

Conclusion.

The Federal Energy Office (now the "Federal Energy Administration") has treated Petitioners (two of which are sovereign states) illegally and with a callous disregard of the practical problems faced by local government. The Temporary Emergency Court of Appeals (at page 16 of the Opinion) has even suggested that Petitioners acted in an "artful" manner in failing to elicit from the FEO its true intention which, on the face of its pronouncements, seemed clear. This accusation reflects a serious misapprehension by T.E.C.A. as to the true character of the relationship between State government and the Federal regulatory agencies. In point of fact, State and local officials have attempted repeatedly to maintain a meaningful dialogue with Federal officials, and have received less than adequate satisfaction. For example, when the State of California first heard rumors that the State and local governmental exemption was being re-considered by the FEO, one of the highest responsible officials in the State (the Chairman of the State Lands Commission) promptly sent a telegram to the Administrator of the agency,

requesting that no action be taken without further hearings and clearly evidencing the State's assumption that the reiteration of the exemption was a substantive act. The only reply received by this official was the sudden revocation of the exemption on February 21, 1974, without further notice.

For the reasons stated herein, a writ of certiorari should issue.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of California,

JAY L. SHAVELSON,
Assistant Attorney General,

WARREN J. ABBOTT,
Deputy Attorney General,

RICHARD A. HAFT,
Deputy Attorney General,
Attorneys for Petitioner
State of California.

LEONARD PUTNAM,
City Attorney of Long Beach,

HAROLD A. LINGLE,
Deputy City Attorney,

ROBERT E. SHANNON,
Deputy City Attorney,
Attorneys for Petitioner
City of Long Beach.

APPENDIX A.

Opinion of Temporary Emergency Court of Appeals.

Temporary Emergency Court of Appeals, of the United States.

Filed: Temporary Emergency Court of Appeals of the United States Aug. 12, 1974.

People of the State of California, Acting by and through the State Lands Commission, City of Long Beach, a California Municipal Corporation, and City of Newport Beach, a California Municipal Corporation, Plaintiffs-Appellees, and State of Louisiana, Plaintiff Intervenor-Appellee, v. William E. Simon, John C. Sawhill, William N. Walker, William C. Arntz, the Administrator of the Federal Energy Office, the Deputy Administrator of the Federal Energy Office, the Chief Counsel of the Federal Energy Office, and the Regional Administrator, Region 9, of the Federal Energy Office of Oil and Gas, Defendants-Appellants. No. 9-12.

Jay L. Shavelson, Asst. Atty Gen., with whom Evelle J. Younger, Att. Gen. of California, Warren J. Abbott, Dep. Atty. Gen., and Richard A. Haft, Dep. Atty. Gen., Los Angeles, California, were on the brief, for Plaintiffs-Appellees, People of State of California.

Robert F. Shannon, with whom Leonard Putnam, City Atty., Harold A. Lingle, Dept. City Atty., and Robert W. Parkin, Dep. City Atty., of City of Long Beach, California, were on the brief, for Plaintiff-Appellee, City of Long Beach.

E. F. Barnett, with whom Camp, Carmouch, Palmer, Carwile & Barsh, were on the brief, for Plaintiff Intervenor-Appellee, State of Louisiana.

Allen W. Hausman, Atty., Dept. of Justice, Washington, D.C., with whom Carla A. Hills, Asst. Atty. Gen., and Stanley D. Rose and Bruce G. Forrest, Attys., Dept. of Justice, Washington, D.C., were on the brief, for Defendants-Appellants.

Richard A. Del Guercio, with whom Demetriou & Del Guercio, James R. Jurecka, and Joseph A. Helyer, were on the brief, for Amici Curiae Edington Oil Company and Independent Refiners Association of California.

John E. Sparks, with whom Robert C. Maddox, and Brobeck, Phleger & Harrison, were on the brief, for Amicus Curiae Union Oil Company of California.

Before CARTER, CHRISTENSEN, and ESTES, Judges.

CHRISTENSEN, Judge.

The decisive issue on this appeal is whether the Federal Energy Office (FEO) had already terminated a rule making proceeding initiated by its predecessor The Cost of Living Council (CLC) when it rescinded the state and local government exemption of crude oil from price controls in reliance upon, and effective as of the date of, the CLC's original rule making notice contemplating such action. We are told that for the appellees alone some quarter of a billion dollars in contested charges, together with daily accessions of more than a million, directly depends upon the answer.[1] We

[1]Because of their reliance upon government sources of supply, a corollary impact will be concentrated upon certain independent refiners concerning whose situation FEO commented during the rule making proceeding: ". . . When this supply data is combined with the dramatically increased prices for exempt crude oil, the magnitude of the impact that primarily is confined to a small group of independent refiners becomes apparent. . . [T]he amounts involved are not insignificant and the impact upon pur-

have been mindful also of even farther reaching agency actions and policies which, consistent with basic fairness, are to be respected within applicable requirements and guidelines of the Economic Stabilization, the Administrative Procedure and the Emergency Petroleum Allocation Acts. Having concluded that in this vital process of modern government[2] the rule in question was not aborted by any significant malformation, we reverse the judgment of the district court which treated the FEO's withdrawal of the state and local government exemption as invalid.[3]

With powers vested in the President by the Economic Stabilization Act and by him delegated to CLC, the latter on August 22, 1973, as part of its Phase IV price control program, issued Cost of Living Council Regulations which provided comprehensive price controls for various types of property. By the terms of "Subpart L", all crude petroleum produced in the United States was subject to price regulation, except for new and released petroleum and petroleum produced from stripper wells, which were left free of price control to encourage additional domestic production. But an exemption was established for certain prices and fees charged by state and local governments and government property.[4] By

---

chasing refiners and ultimate consumers is magnified by the price spread of about $5.00 per barrel between ceiling prices for old oil and uncontrolled prices for exempt oil." (39 F.R. 12253-54.)

[2]"The procedure of administrative rule making is one of the greatest inventions of modern government." Davis, *Administrative Law Treatise* § 6.15, p. 283 (1970 Suppl.).

[3]The jurisdiction of this court is based upon Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, which incorporates by reference Sections 205-211 of the Economic Stabilization Act of 1970, as amended, including judicial review provisions granting original jurisdiction to the district courts and appellate jurisdiction to this court with reference to actions, orders and regulations under the Act.

[4]6 C.F.R. §§ 150.54(a)(2) and 150.54(f)(2).

interpretation of the agency this exemption covered sale of crude oil by those governments in their proprietary capacities.[5]

On October 25, 1973, CLC issued a notice of proposed rule making[6] which among other things stated:

> "Notice is hereby given that, pursuant to the authority of Executive Orders 11695 and 11730, Cost of Living Council, as part of its continuing review of the operation of price controls with respect to the petroleum industry is considering the adoption of certain amendments to exclude sales of 'covered products' as defined in Subpart L from the exemption of price adjustments by State and Local governments."

The notice invited interested persons to participate in the rulemaking by submitting written data, views or arguments with respect to the proposed regulation and specified that all comments received by November 24, 1973, "will be considered by the Council before final action is taken on the proposed regulation". Cali-

---

[5]Union has contended that the initial state and local exemption, under principles of *ejusdem generis,* did not apply to sales by the state in its proprietary capacity of crude oil subject to Subpart L and that a contrary construction would present a serious question as to whether the classification conforms with the statute or the Constitution. However, those questions are not presented by this appeal, and for its purposes may be assumed to be laid to rest by the interpretation implicit in the October 25, 1973, notice of the CLC next mentioned. Amici curiae Edgington Oil Company and Independent Refiners Association of California, Inc., contend that even if the termination of the state and local government exemption were invalid, the grant of the exemption itself was also invalid for failure to follow the rule making procedures of the Emergency Petroleum Allocation Act and the Administrative Procedure Act. We do not consider this contention in view of our ruling that the termination of the exemption by FEO was valid.

[6]38 F.R. 29618, Oct. 26, 1973.

fornia and Louisiana, among others, timely submitted comments. It is not contended by any party that the notice and proceedings up to this point were deficient either in form or substance or that they would not have permitted the promulgation of a regulation by FEO as successor to CLC validly removing the state and local government exemption had the former not reiterated the exemption in establishing the regulatory framework of its activities under the circumstances hereinafter noted.

The Emergency Petroleum Allocation Act of 1973 was approved on November 27, 1973. Section 4(a) required the President to provide within fifteen days after enactment for the mandatory allocation of crude oil and various petroleum products in amounts and at prices "specified (or determined in a manner prescribed by)" his regulations.

The FEO was created by Executive Order 11748[7] on December 4, 1973. Its Administrator was thereby vested with all powers delegated to the President by the Emergency Petroleum Allocation Act, and the Chairman of CLC was authorized to delegate to the Administrator "such authority under the Economic Stabilization Act as may be necessary to carry out the purposes of that Act with respect to energy matters."

Acting pursuant to Section 4(a) the FEO issued proposed mandatory fuel allocation regulations[8] on December 11, 1973. Part 201 of these regulations adopted by reference the pricing provisions of CLC's Phase IV Regulation mentioned above,[9] thus continuing in

---

[7]88 F.R. 33575, Dec. 6, 1973.
[8]38 F.R. 34414 et seq., Dec. 13, 1973.
[9]6 C.F.R. 150.

effect the state and local government exemptions in accordance with the CLC's interpretation.

On December 26, 1973, the Chairman of CLC issued an order delegating to the Administrator of FEO the powers vested in him pursuant to Executive Orders 11695 and 11730 "to make determinations and take actions required or permitted by the Economic Stabilization Act of 1970, as amended, with respect to petroleum products and crude oil. . . ." and further providing as follows:[10]

> "6. All orders, regulations, circulars or other directives issued and all other actions taken pursuant to any authority delegated to the Administrator by this order prior to and in effect on the date of this order are hereby confirmed and ratified, and shall remain in full force and effect, as if issued under this order, unless or until altered, amended or revoked by the Administrator or by such competent authority as he may specify."

One of the "actions taken" pursuant to the delegated authority was the pending rule making proceeding which had been instituted on October 25, 1973.

On December 27, 1973, Mandatory Fuel Allocation Regulations were adopted by the FEO as proposed on December 11, 1973.[11] The pricing provisions set out in Part 201 were thus adopted, continuing in effect the state and local government exemption. These regulations specified January 15, 1974, as the implementation date for all of the provisions.

On January 14, 1974, one day before the implementation date last mentioned, FEO revoked the December

---

[10]Delegation Order 47, 39 F.R. 24, January 2, 1974.

[11]39 F.R. 744, et seq., Jan. 2, 1974.

27 regulations and promulgated revised regulations designated as Parts 205, 210, 211 and 212 of Title 10, Chapter II of the Code of Federal Regulations. Part 212 set out in full pricing provisions for crude oil and other petroleum products. Section 212.52(b) expressly stated: "Prices charged for any sale or lease-sale of a covered product [which included crude oil] by state and local governments are exempt." In explanation, the Deputy Administrator stated:[12]

> "A new Part 210 has been created establishing the general rules which apply to both the price control and allocation programs. This part extracts sections previously located in Subpart A of Part 200 and in the Phase IV Price Regulations in 6 CFR Part 150.
>
> "The creation of Part 210 recognizes the compelling necessity of viewing both allocation and price problems within the context of a single regulatory framework.
>
> . . . .
>
> "Due to the fact that a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise, the Federal Energy Office is inviting comment on these regulations. Although no specific future changes are currently anticipated, the Federal Energy Office would appreciate all comments or suggestions which might assist in future improvements to the program. . . ."

Neither the FEO's December 11 proposal, its regulations of December 27, nor the January 14 codifica-

[12] 39 F.R. 1924, Jan. 15, 1974.

tion contained any reference to the rule making proceeding instituted October 25, 1973, by CLC and delegated in general language as noted above by the latter to FEO on December 26. The appellees, in line with the opinion of the court below, contend that this circumstance, coupled with the FEO comment of January 14 hereinabove quoted, indicated an abandonment or termination of the rule making proceeding in question. The appellants draw the opposite conclusion, contending that the absence of any express disposition, the inherently ongoing nature of that process and the interim necessity of establishing on its own responsibility the mandatory regulatory framework with reference to which the proposed rule making could continue and, indeed, was continued under consideration, negated any implied or constructive termination.

In any event, on February 21, 1974, FEO issued an order, by which it expressly acted upon the CLC's Notice of Proposed Rule Making dated October 25, 1973, to revoke the exemption for state and local governments effective as of the latter date finding, among other things, that the exemption, if not so removed, "would tend to have a disruptive impact on the national distribution system."[13]

On March 7, 1974, as a result of representations of the appellees, FEO issued a notice of proposed reconsideration of the February 21 decision. A hearing was scheduled for March 13, 1974, and the public was invited to submit written comments by March 15 in lieu of, or in addition to, oral presentations.[14]

---

[13]39 F.R. 7176, February 25, 1974, deleting § 212.52(b) of 10 C.F.R., *supra.*

[14]39 F.R. 8996, March 7, 1974.

April 2, 1974, upon reconsideration in the light of supplemental information provided by the parties, FEO reconfirmed its decision to withdraw as of October 25, 1973, the exemption of state and local government sales of covered petroleum and petroleum products with two modifications: The federal government exemption also was removed; and ". . . with respect to deliveries of crude oil made on or before February 21, 1974, a state or local government may charge a bonus price per barrel of crude oil provided that such bonus price was stipulated in existing contracts. . . ."[15]

This action was commenced by plaintiffs-appellees in the district court on March 13, 1974, seeking declaratory and injunctive relief. On April 25, 1974, plaintiffs' application for a preliminary and permanent injunction was granted with a "memorandum opinion to follow." The opinion was filed May 1, and in harmony therewith formal findings of fact, conclusions of law and judgment and order[16] were entered May

---

[15]39 F.R. 12255, April 4, 1974.

[16]The district court found that the FEO had terminated its rule making proceedings before the action of February 21, 1974, thereby rendering that decision invalid. It was held also that, even if otherwise valid, the withdrawal of the exemption could not be applied retroactively to transactions which occurred before February 21, 1974. While the court below held no formal trial, its findings were based in part upon uncontroverted affidavits filed by the plaintiffs and intervenors in support of the motion for preliminary injunction. The judgment among other things permanently enjoined the defendants from attempting to enforce as against the plaintiffs or plaintiffs in intervention the provisions of Part 212, Chapter II, Title 10 of the Code of Federal Regulations insofar as said attempt was based upon the actions of February 21, 1974, and April 2, 1974, and from taking any action against any lessee of, or any person having contractual relations with, plaintiff or plaintiff in intervention based upon the purported elimination of the exemption as reflected in the actions of the Federal Energy Office of February 21, 1974, and April 2, 1974.

28, from which this appeal was timely perfected. This court on May 29, 1974, granted defendants-appellants' Motion for Stay Pending Appeal to "maintain the status quo" and "in no way reflect[ing] a decision on the merits." An expedited briefing schedule was ordered. Upon hearing oral argument following careful consideration of the briefs, and deeming ourselves fully advised, we reversed without delay in view of the rapidly increasing magnitude of the excess charges in question.[17] This opinion now more fully documents such determination.

While various issues are argued separately in the briefs[18] we regard as largely determinative the one framed at the outset, which may be restated as whether the rule making proceeding initiated by the CLC

---

[17]The judgment of the district court is reversed. Our judgment shall be entered forthwith. The mandate also shall be issued and filed forthwith. An opinion will follow.

This order is made in the interests of expediting a decision and for good cause based on the following facts:

> This is an important case. The parties have sought expedited oral argument. We have set the case for the earliest possible date.
>
> The amount in controversy which is the difference between the controlled and uncontrolled prices for state and local government sales of crude oil is increasing at the rate of $1.2 million per day. The legal uncertainty surrounding these payments is injurious to the interests of all parties as well as third party small independent refiners who have accrued potential liabilities to the states. (Order of July 26, 1974, from the bench.)

[18]1. Whether FEO terminated the rule making proceeding proposing to withdraw an exemption for price controls on state and local government sales of petroleum products.

2. Whether such termination, if found, renders invalid its decision of February 21, 1974, to remove the exemption.

3. Whether FEO's reopening the matter for further hearings and written comments cured the alleged legal defect.

4. Whether in removing the exemption from price controls for sales by state and local governments on February 21, 1974, effective as of October 25, 1973, FEO acted unlawfully by imposing a "retroactive" requirement.

was terminated prior to February 21, 1974, in the sense of depriving FEO of power in reliance thereon to withdraw the state and local government exemption without giving the statutory notice anew in strict recompliance with the requirements of the Federal Administrative Procedure Act concerning rule making.[19]

We find it unnecessary to rule separately upon appellants' further contention that even though the rule

---

[19]Section 5 of the Emergency Petroleum Allocation Act of 1973 provides in part as follows:

> "§5. Administration and Enforcement.—(a)(1) Except as provided in paragraph (2), (A), sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970. . . ."

By the terms of the Economic Stabilization Act as amended, Section 553 of the Administrative Procedure Act applies. That section provides in substance that general notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice in accordance with law, the notice to state the time, place and nature of the public rule making proceedings, a reference to the legal authority under which the rule is proposed and either the terms or substance of the proposed rule or a description of the subjects and issues involved. The agency is required to give interested persons an opportunity to participate in the rule making through submission of written data, views or argument with or without opportunity for oral presentation. "After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose." It is further provided that the required publication or service of a substantive rule shall be made not less than 30 days before its effective date except as to substantive rules which grant or recognize an exemption or relieve a restriction, interpretive rules and statements of policy or as otherwise provided by the agency for good cause found and published with the rule. It is further provided that each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

making procedure initiated by the CLC were terminated there yet was substantial compliance with the Administrative Procedure Act which should be deemed to sustain the FEO order of February 21, 1974, in that since by the initial CLC notice the parties were afforded full opportunity for comment in compliance with the Administrative Procedure Act they were not prejudiced by being restricted to an additional eight days in connection with its reconsideration by FEO order, and considering that order as representing a new proceeding. While we question that procedure for reconsideration may be substituted for the required initial notice—the Administrative Procedure Act requires both—the former, together with other phases of the entire rule making proceeding may be looked to on the termination issue particularly in relation to the problem of essential fairness. In the absence of any termination of the proceeding, the problem of retroactivity becomes less acute.

No dispute is presented concerning the substantive merits of the action withdrawing the state and local government exemption. The attack against it is directed purely to the procedure utilized. There is little of substance to the claim that intervening transfer of authority from CLC to FEO and the subsequent republication of price control regulations by FEO in a different section of the Code of Federal Regulations terminated the rule making proceeding. In the republication of January 14, 1974, upon which appellees principally rely, there was no discussion of FEO's consideration of the exemption in question, nor was there incorporated a general statement of the purpose for the exemption on the theory that the republication was intended as a determination of the rule making proceed-

ing.[20] That the FEO before issuing its February 21, 1974, order did not intend to substantively resolve the rule making proceeding initiated by its predecessor is not subject to doubt. It never so stated. It indicated expressly to the contrary by its order, the explanatory comments accompanying it,[21] and its notice with respect to, and order denying reconsideration.

We think the appellants are right in saying that but for unique circumstances which caused FEO to promulgate a massively complex petroleum allocation scheme and hold the issue of state and local government price exemption in abeyance until the issues could be approached in a conscientious manner, this controversy never would have arisen. We are of the opinion, as heretofore indicated, that FEO did not terminate this otherwise valid proceeding "essential to prevent serious inflationary injury to the economy and structural injury to the petroleum industry", as FEO found. It was entitled to reasonable leeway in the gale of the congressional deadline while it assumed charge of the regulatory structure before being required to complete the repair initiated by CLC.[22]

No case has been called to our attention, nor can we find any, which applies a doctrine of constructive termination of a rule making proceeding after its ex-

---

[20]Section 664(d) of the APA provides in part as follows: "After consideration of the relevant matters presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

[21]FEO therein outlined the history of the exemption, stated that it did not act substantively upon the pricing regulations during the course of the transfer of powers, and that the issue surrounding the rule making proceeding was "necessarily deferred until the basic regulatory framework called for by the Act had been formulated and put in effect."

[22]See Mandel v. Simon, 493 F.2d 1239 (T.E.C.A. 1974).

press termination by final decision of the responsible agency with the result of reversing the effect of that express determination contrary to the findings and intent of the agency.[23] This is not to say that under some circumstances bad faith, basic unfairness or unconscionable delay could not justify a different result. Such were not present here.

Appellees do contend that they justifiably relied upon FEO's reiterations of the exemption as an assurance that the rule making proceeding had been terminated favorably to them, that subsequent removal of the exemption deprived them of fair opportunity to make current comment and that they were led into an injurious change of position. The district court glanced in the same direction.[24] However, there was no finding, nor do the facts indicate, that there was a change of position by any party in interest that would not have

---

[23]Supplementing the briefs, appellants cited during oral argument Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C.Cir. 1970), on the question whether under some circumstances administrative inaction may be "the equivalent of an order denying relief". That case involved the reviewability of administrative inaction which had the effect of denying interim relief to petitioners. The issues and facts there were quite dissimilar; but its mandate of remand to the agency for decision conforms the incongruity of applying the ruling to this case where a decision concededly supported by the factual record long since has been made by the agency.

[24]It referred to the following events which "could have had" a significant effect upon the nature and thrust of comments made as of the earlier date: A three hundred percent increase in the price of uncontrolled oil, which "means that State and local governments are now receiving less than one-half of the true market value for their oil"; based upon revenue estimates and the actions of the Federal Energy Office seeming to assure the continuance of the exemption, State and local governments involved commenced plans to devote millions of dollars to increased secondary recovery operations; proposals were made by prominent State officials to utilize increased revenues for rapid transit and other purposes; basic legislation, such as the Emergency Petroleum Allocation Act, was enacted.

been taken in a general hope of the continuation of the exemption had the takeover by FEO not been accomplished prior to the completion of the rule making proceeding. Had there been any induced assumption that the exemption would not be removed as a result of the pending rule making proceeding, there still could have been no assurance that by new rule making procedures otherwise initiated, whether retroactive or not, most if not all of the injury the appellees had apprehended would not have occurred anyway. On no theory did appellees have a vested right to a continuation of the preferential treatment. The contention that if a new proceeding had been initiated appellees some way would have been more effective in their arguments against change is unconvincing. The intervening circumstances themselves, including passage of the Emergency Petroleum Allocation Act, would have weakened rather than strengthened their hand. And, in fact, they did have fair opportunity for updated arguments in connection with the proceedings for reconsideration. There is simply no indication that any significant arguments were withheld or disregarded or that the appellees were unfairly treated.[25]

The appellees extract from the January 14, 1974, order the phrase ". . . although no specific future changes are currently anticipated . . ." and argue that this warranted the assumption on their part that the change contemplated by the pending rule making proceeding had been abandoned. This disregards the preceding sentence stating that "a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with

[25]See Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 226 (D.C. Cir. 1967).

the regulations will surely arise." There had been a substantial revision as to allocation provisions but not as to prices. The pending rule making did not present an unanticipated problem but one inherent in the exemption and specifically pointed up from the time of the October 25, 1973, notice. In contrast, the new allocation provisions could reasonably have been referred to as involving no current anticipation of future changes; but in general comments for "future improvements" were invited. Irrespective of any question this statement may have raised, appellees' claim of good faith reliance takes on a somewhat hollow, if not artful, sound in view of information elicited during oral argument that at no time prior to actual withdrawal of the exemption did any of them so much as inquire of the agency whether the rule making proceeding looking toward the withdrawal of the exemption had, indeed, been abandoned. And such inquiry manifestly would have precluded the present argument. Moreover, while counsel for the State of California said he advised his client that he was "certain" the proposed withdrawal had been abandoned, it continued to use its form of contract providing a hedge against that prospect.

The district court held that "[t]he action of the Federal Energy Office of February 21, 1974, amending its regulations to eliminate the exemption, even if otherwise valid, cannot be given retroactive effect . . ." on the findings that each of the original plaintiffs had entered into contracts for the sale of crude oil involving, in the aggregate, millions of dollars in reliance thereon "either as originally promulgated by the Cost of Living Council, or as continued in effect by the Federal Energy Office"; and each of the plaintiffs had "included

in its budget revenue from the sale of crude oil at prices determined in reliance on the exemption, and the Executive Officer of the State Lands Commission specifically relied on the rules adopted by the Federal Energy Office on December 27, 1973, and January 14, 1974, in executing royalty oil sales contracts."

As already observed, the rule making procedure was an ongoing one until it culminated in the order of February 21, 1974. The court's additional findings with specific reference to retroactivity add little to the considerations already discussed. Similar reliance could be claimed with about equal force to any initiation or continuation of an exemption. Yet typical retroactivity questioned but accepted in the cases has included the absence of advance notice such as involved here. Assuming that there was a retroactive application, the rule does not necessarily fail the test relied upon by appellees upon the basis of the district court's findings.[26] A retroactive rule is invalid, generally speaking, only if unreasonable. As said in SEC v. Chenery, 332 U.S. 194, 203 (1947), "[R]etroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." On balance, and in the absence of any finding of fact precluding this view, we are of the opinion that the fixing of the effective date of the withdrawal of the exemption as of October 25, 1973, was not unreasonable.

---

[26]See Retail, Wholesale and Department Store Union, 466 F.2d 380 (D.C. Cir. 1974).

But we are not concerned with retroactivity in the usual sense. Involved were prices which from the very inception of the rule making proceeding could be regarded as conditional.[27] The October 25, 1973, notice clearly stated that the change if made would be effective as of said date. An order based upon a statutory notice of contemplated rule making specifying an effective date in accordance with the intention revealed in the notice itself and no earlier than the date of the notice involves few, if any, of the problems of retroactive regulation generally. It would seem to be comparable in principle to a judgment which within the court's jurisdiction treats a situation or awards a remedy as of the time of the commencement of the action. In any event, the effective date of the rule in question is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies.

A related question not addressed by the trial court merits additional concern: Whether there was technical compliance with Section 553(d) of the Administrative Procedure Act, which requires publication or service of a substantive rule "not less than 30 days before its effective date, except . . . (3) as otherwise provided by the agency for good cause found and published with the rule. . . ." It was, indeed, so "provided by the agency", but the rule itself contained no express finding of such good cause. Yet from the reasons and purposes there assigned for the withdrawal of the exemption itself, and the very nature of the entire proceeding in context with the Economic Stabilization Act and the

---

[27]See Woods v. Stone, 333 U.S. 472, 477; University of Southern California v. Cost of Living Council, 472 F.2d 1065 T.E.C.A. 1972), *cert. denied*, 410 U.S. 928; Fancher v. Clark, 127 F.Supp. 452 (D.C. Colo. 1954).

Emergency Petroleum Allocation Act, the cogent reasons for the withdrawal of the exemption as of the date of the initial notice were quite obvious. Under such circumstances any flaw was at most purely technical, being neither prejudicial nor invalidating.[28]

We agree that substantial compliance with rule making requirements is essential to the validity of administrative rules therein contemplated. The cases relied upon by appellees[29] to demonstrate the necessity of literal compliance are distinguishable on their facts, involving, for example, no notice at all, basically unfair procedures, lack of opportunity to be heard, absence of publication, and similar serious defects. The Supreme Court has furnished no such indication, but to the extent decisions of other courts may suggest a doctrine of technical absolutism in opposition to the effectiveness of the rule under the circumstances here, we decline to follow them. We conclude that the procedure in question from the standpoint of substantial statutory compliance, fairness, circumspection, prior notice, opportunity to be heard and abundant record justification,[30] against the background of an embry-

---

[28]*Cf.* Hoving Corporation v. FTC, 290 F.2d 803 (2d Cir. 1961).

[29]National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759 (1969); Lewis-Mota v. Secretary of Labor, 469 F. 2d 478 (2d Cir. 1972); Texaco Inc. v. Federal Power Commission, 412 F.2d 740 (D.C. Cir. 1969); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Ann Arbor Railroad Co. v. United States, 58 F. Supp. 933 (E.D. Pa. 1973); Kelly v. United States Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972); Gerends v. Butz, 357 F. Supp. 143 (1973).

[30]The FEO in its February 21, 1974, order found *inter alia* that "the price exemption has no significant impact on the supply of crude oil", that it "would tend to have a disruptive impact on the national distribution system", that it was necessary to eliminate the "incentive for state and local governments to seek to enter into agreements or arrangements regarding the sale of

onic agency faced with complicated takeover tasks under a Congressional deadline,[31] was such as to properly render such mere technical objection unavailing.

Finally, the "clearly erroneous rule"[32] relied upon by appellees pervasively to support the district court's conclusions does not aid their position. While we shall assume that the affidavits in the record support the found facts as to any significant issue, these were tenuous at best. Where they are in conflict with the views herein expressed they are either not findings of fact at all, or mixed findings of fact and conclusions of law made under an erroneous view of controlling law, as to which the effect of the clearly erroneous rule is dissipated.[33] Closer to the mark is the great deference with which the acts and interpretations of administrative agencies are to be regarded by the courts when, as here, they are acting within their jurisdiction and in the exercise of delegated duties under the Emergency Petroleum Allocation Act and its predecessor, the Economic Stabilization Act.[34]

---

covered products which could tend to result in further dislocations in the national distribution system . . . [and] undermine existing supplier relationships and magnify the inflationary effects of the exemption".

[31]*Cf.* Mandel v. Simon, 493 F.2d 1239, 1240 (T.E.C.A. 1973), *supra;* University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1069 (T.E.C.A. 1972).

[32]Rule 53, Fed. R. Civ. P.

[33]5A Moore, § 52.03[2] pp. 2663-64. See e.g. U.S. v. Mississippi Valley Co., 364 U.S. 520, 526 (1961); United States v. United States Gypsum, 333 U.S. 364 (1948); U.S. v. Richberg, 398 F.2d 523, 526 (5th Cir. 1968); University Hills Inc. v. Patton, 427 F.2d 1094, 1099 (6th Cir. 1970); Rowe v. General Motors Corporation, 457 F.2d 348, 351 (5th Cir. 1972).

[34]Baldwin County Elec. Mem. Corp. v. Price Commission, 481 F.2d 920 (T.E.C.A. 1973); University of Southern California v. Cost of Living Council, 472 F.2d 1065 (T.E.C.A. 1972), *supra; United States v. Lieb,* 462 F.2d 1161 (T.E.C.A. 1972).

The judgment of the district court is reversed and the case remanded with directions to grant the defendants' motion to dismiss the action on the merits.

Temporary Emergency Court of Appeals of the United States.

Before Judges Carter, Christensen and Estes.

People of the State of California, et al., Plaintiffs-Appellees, and State of Louisiana, Intervenor-Appellee, v. William E. Simon, et al., Defendants-Appellants. No. 9-12.

IT IS ORDERED that the judgment date appearing on the lower right hand corner (cover sheet) of the slip opinion issued August 12, 1974 is modified to read "July 26, 1974".

FOR THE COURT:
Thomas R. Napton
Clerk
/s/ by Donna M. Bold
Donna M. Bold
Deputy Clerk

August 14, 1974

APPENDIX B.

Opinion of United States District Court for the Central District of California.

United States District Court, Central District of California.

People of the State of California, et al., Plaintiffs, vs. William E. Simon, etc., et al., Defendants. CV-74-661-JWC.

Filed: May 1, 1974.

OPINION

In this action the plaintiffs, subsequently joined by the intervenor, are seeking to enjoin the administrator of the Federal Energy Office from putting into effect and enforcing an amendment to regulations adopted by the Federal Energy Office on February 21, 1974. This amendment purports to terminate retroactively state and local agencies' exemption from regulation in respect to prices charged for crude oil. A temporary restraining order having been heretofore issued, the matter now comes before this court on an application for a preliminary injunction. The parties, however, have agreed that this case may be submitted to the court for final judgment on all issues.

FACTS

Under Phase IV of the regulations promulgated under the Economic Stabilization Act of 1970[1] state and local governments were exempt from price controls insofar as they relate to crude oil production.[2] On October 23, 1973, the Cost of Living Council,

---

[1]Economic Stabilization Act of 1970, Pub. L. 91-379, 84 Stat. 799, as amended, 12 U.S.C.A. § 1904 note.

[2]6 C.F.R. § 150.54, 38 Fed. Reg. 21601 (1973).

acting under the Economic Stabilization Act issued a Notice of Proposed Rule Making[3] proposing to amend Title 6 of the Code of Federal Regulations so as to terminate state and local exemption retroactively to the date of the notice. This notice specified that the ending date for comment on the proposed rule was November 24, 1973. The State of California and the City of Long Beach filed comments opposing said rule and the State sought a formal hearing. However no further action was taken pursuant to this notice by the Cost of Living Council.

On November 27, 1973, the President approved the Emergency Petroleum Allocation Act of 1973,[4] which specifically required the President to promulgate and adopt new regulations relating to the mandatory allocation and pricing of crude oil. Pursuant to this authority conferred upon the President, he, by Executive Order,[5] created the Federal Energy Office and delegated to it the authority to issue regulations contemplated by the Petroleum Allocation Act of 1973.

On December 27, 1973, the Federal Energy Office adopted regulations which incorporated into Title 10 of the Code of Federal Regulations the pricing provisions (including the state and local exemption) previously set forth in Phase IV of the price regulations adopted by the Cost of Living Council.[6]

By regulations adopted January 14, 1974,[7] the Federal Energy Office made substantial changes in its reg-

---

[3]The notice of proposed rule-making is at 38 Fed. Reg. 29618 (1973).

[4]Pub. L. 93-159, 87 Stat. 627.

[5]Executive Order 11748, 38 Fed. Reg. 33575 (1973).

[6]Dec. 27 regs.: 39 Fed. Reg. 744 et seq. (1974).

[7]Jan. 14 regs.: 39 Fed. Reg. 1924 et seq. (1974).

ulations previously adopted December 27, 1973. These changes included the adoption of 10 C.F.R. Part 212, which set forth in full pricing provisions applicable to crude oil and other petroleum products. Section 212.52(b) expressly stated that "Prices charged for any sale, lease or lease-sale of a covered product [including crude oil] by State and local governments are exempt." The summary preceding the January 14 regulations stated ". . . no specific future changes [in the regulations] are currently anticipated. . . ."[8]

On February 21, 1974, the Federal Energy Office, purporting to act pursuant to the Notice of Proposed Rule Making issued by the Cost of Living Council, revoked the state and local exemption, retroactive to October 25, 1973, the date of the notice.[9]

It is plaintiffs' position that the defendants may revoke the state and local exemptions only by issuing a new notice and the holding of such hearings as are contemplated by the regulations. Accordingly, they contend that the order of February 21, 1974, is a nullity and, in any event, cannot be applied retroactively. I agree.

The Federal Energy Office, once established, took what it wanted from the Cost of Living Council, republished regulations as its own which kept the exemption, and also stated that there was no present intention of changing the regulations. Those actions terminated the rule making proceedings begun by the October 25, 1973, notice.

If, following termination of the rule making proceedings under the October 25, 1973 notice, the Federal

[8]39 Fed. Reg. 1924 (1974).
[9]Feb. 21, 1974 regs.: 39 Fed. Reg. 7176 (1974).

Energy Office desired to change the regulations, it should have proceeded in accordance with § 553 of the Administrative Procedure Act (5 U.S.C. § 553) for this section is made expressly applicable to Federal Energy Office rule making by the Emergency Petroleum Allocation Act of 1973. In pertinent part this section requires that notice of proposed rule making shall be published in the Federal Register; that the required publication be made not less than 30 days before the effective date of a rule; and that after the notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written or oral data, views and arguments. The revocation of the state and local exemption on February 21, 1974, constituted rule making within the meaning of this section and cannot be upheld because of its obvious failure to comply with the administrative procedure requirements.

We come now to the question of whether the action of the Federal Energy Office of February 21, 1974, amending its regulations to eliminate the exemption, even if otherwise valid, can be given retroactive effect. I hold that it cannot.

Although an administrative agency in the course of its judicatory process may make a ruling which has a retroactive effect, the courts have been most reluctant to apply retroactively agency pronouncements made as a part of their rule making function. The courts in most instances have given only prospective application to such action. In this connection, the following discussion appears in Davis, Administrative Law Treatise, § 5.08 at 340-41 (1958).

> "Since legislative rules are merely the administrative counterpart of statutes, the argument is plaus-

ible that legislative rules may be retroactive whenever a statute may be retroactive, since the fairness or unfairness is the same and judicial ideas of fairness are decisive. But agencies have no powers except those conferred and power to issue retroactive rules is not easily implied. State courts readily hold that retroactive rate orders are invalid for lack of statutory authority. And courts are less reluctant to upset mere administrative regulations than to upset statutes. Because retroactivity is not favored, a reasonable initial view is that retroactive rules should be tolerated only when specifically authorized by statute." [footnotes omitted]

In *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2nd Cir., 1966) Judge Friendly, speaking on the issue of retroactivity, stated:

"There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, SEC v. Chenery Corp., 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947), that since an administrative agency has 'the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct', and that the 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.' [Citations omitted]" [Footnotes omitted]

So, in *Arizona Grocery Company v. AT&SF Ry. Co.*, 284 U.S. 370, 52 S.Ct. 183 (1932), the Court

rejected an attempt by the I.C.C. to apply a rate change retroactively. In *Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390 (D.C.Cir. 1972), the court, denying retroactive force to a newly adopted administrative rule, stated:

> ". . . and courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interest. [Citations omitted]"

The court, then, proposed certain guidelines which should be considered in determining if an administrative agency rule should be retroactively applied.

> "Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Id.*

Applying these tests to the facts presented here (1) the February 21, 1974, amendment was not a matter of first impression, it was a change of a rule under which the parties had been acting and on which they had relied since its adoption by the Federal Energy Office. (2) It represents an abrupt departure from a well established practice, and does not merely attempt to fill a void in an unsettled area of law. (3) Each of the

plaintiffs in this action has entered into contracts for the sale of crude oil involving millions of dollars in reliance upon the state and local governments' exemption. (4) Each of the plaintiffs has included in its budget revenue from the sale of crude oil at prices determined in reliance upon the exemption which revenue, presumably, has either been partially expended or committed. And (5) there is no strong compelling statutory interest in applying the new rule retroactively. The continuance of the exemption may well permit additional expenditures by the plaintiffs for increased oil production, which is one of the objectives of the Emergency Petroleum Allocation Act of 1973. Whatever statutory interests there may be, they do not counterbalance the inequity of retroactive application of FEO's amendment.

The application for preliminary and permanent injunction is hereby granted. Attorneys for the plaintiffs will prepare findings of fact, conclusions of law and judgment.

DATED: May 1, 1974.

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX C.

1. Economic Stabilization Act of 1970 as Amended on December 22, 1971 (85 Stat. 744 et seq.).

Public Law 92-210

AN ACT

To extend and amend the Economic Stabilization Act of 1970, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Economic Stabilization Act Amendments of 1971".

ECONOMIC STABILIZATION ACT OF 1970

SEC. 2. Title II of the Act entitled "An Act to amend the Defense Production Act of 1950, and for other purposes", approved August 15, 1970 (Public Law 91-379), as amended, is amended to read as follows:

"TITLE II—COST OF LIVING STABILIZATION

"§ 201. Short title

"This title may be cited as the 'Economic Stabilization Act of 1970'.

"§ 202. Findings

"It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government.

The President is in a position to implement promptly and effectively the program authorized by this title

"§ 203. Presidential authority

"(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

"(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title; and

"(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth.

Such orders and regulations shall provide for the making of such adjustments as may be necessary to prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b).

"(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall—

"(1) be generally fair and equitable;

"(2) provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross

inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;

"(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;

"(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other pertinent factors; and

"(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy.

"(c)(1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to Novem-

ber 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

"(d) Notwithstanding any other provisions of this title, this title shall be implemented in such a manner that wage increases to any individual whose earnings are substandard or who is a member of the working poor shall not be limited in any manner, until such time as his earnings are no longer substandard or he is no longer a member of the working poor.

"(e) Whenever the authority of this title is implemented with respect to significant segments of the economy, the President shall require the issuance of

regulations or orders providing for the stabilization of interest rates and finance charges, unless he issues a determination, accompanied by a statement of reasons, that such regulations or orders are not necessary to maintain such rates and charges at levels consonant with orderly economic growth.

"(f) The authority conferred by this section shall not be exercised to preclude the payment of any increase in wages—

"(1) required under the Fair Labor Standards Act of 1938, as amended, or effected as a result of enforcement action under such Act; or

"(2) required in order to comply with wage determinations made by any agency in the executive branch of the Government pursuant to law for work (A) performed under contracts with, or to be performed with financial assistance from, the United States or the District of Columbia, or any agency or instrumentality thereof, or (B) performed by aliens who are immigrants or who have been temporarily admitted to the United States pursuant to the Immigration and Nationality Act; or

"(3) paid in conjunction with existing or newly established employee incentive programs which are designed to reflect directly increases in employee productivity.

"(g) For the purposes of this section the term 'wages' and 'salaries' do not include contributions by any employer pursuant to a compensation adjustment for—

"(1) any pension, profit sharing, or annuity and savings plan which meets the requirements of

section 401(a), 404(a)(2), or 403(b) of the Internal Revenue Code of 1954;

"(2) any group insurance plan; or

"(3) any disability and health plan;

unless the President determines that the contributions made by any such employer are unreasonably inconsistent with the standards for wage, salary, and price increases issued under subsection (b).

"(h) No State or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

"(i) Rules, regulations, and orders issued under this title shall insofar as practicable be designed to encourage labor-management cooperation for the purpose of achieving increased productivity, and the Executive Director of the National Commission on Productivity shall when appropriate be consulted in the formulation of policies, rules, regulations, orders, and amendments under this title.

"§ 204. Delegation

"The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he deems appropriate, or to boards, commissions, and similar entities composed in whole or in part of members appointed to represent different sectors of the economy and the general public. Members of such boards, commissions, and similar entities shall be appointed by the President by and with the advice and consent of the Senate; except that—

"(1) the foregoing requirement with respect to Senate confirmation does not apply to any mem-

ber of any such board, commission, or similar entity (other than the Chairman of the Pay Board, established by section 7 of Executive Order Numbered 11627 of October 15, 1971, and the Chairman of the Price Commission, established by section 8 of such Executive order) who is serving, pursuant to appointment by the President, on such board, commission, or similar entity on the date of enactment of the Economic Stabilization Act Amendments of 1971, and who continues to serve, pursuant to such appointment, on such board, commission, or similar entity after such date; and

"(2) any person serving in the office of Chairman of such Pay Board, and any person serving in the office of Chairman of such Price Commission, on the date of enactment of the Economic Stabilization Act Amendments of 1971, may continue to serve in such capacity on an interim basis without regard to the foregoing requirement with respect to Senate confirmation until the expiration of sixty days after the date of enactment of the Economic Stabilization Act Amendments of 1971, and the provisions of sections 910-913 of title 5, United States Code, shall be applicable with respect to the procedure to be followed in the Senate in considering the nomination of any person to either of such offices submitted to the Senate by the President during such sixty-day period, except that references in such provisions to a 'resolution with respect to a reorganization plan' shall be deemed for the purpose of this section to refer to such nominations.

Where such boards, commissions, and similar entities are composed in part of members who serve on less

than a full-time basis, legal authority shall be placed in their chairmen who shall be employees of the United States and who shall act only in accordance with the majority vote of members. Nothing in section 203, 205, 207, 208, or 209 of title 18, United States Code, shall be deemed to apply to any member of any such board, commission, or similar entity who serves on less than a full-time basis because of membership on such board, commission, or entity.

"§ 205. Confidentiality of information

"All information reported to or otherwise obtained by any person exercising authority this title which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential for the purposes of that section, except that such information may be disclosed to other persons empowered to carry out this title solely for the purpose of carrying out this title or when relevant in any proceeding under this title.

"§ 206. Subpena power

"The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purpose related to this title, to sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpena served upon any person under the provisions of this section, the head of the agency authorizing such subpena, or his delegate, may request the Attorney General to seek the aid of the dis-

district court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency.

"§ 207. Administrative procedure

"(a) The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, except as to the requirements of sections 552, 553, and 555 (e) of title 5, United States Code.

"(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings where deemed advisable, for considering such requests for action under this section.

"(c) To the maximum extent possible, the President or his delegate shall conduct formal hearings for the purpose of hearing arguments or acquiring information bearing on a change or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy, and such hearings shall be open to the public except that a private formal hearing may be conducted to receive information considered confidential under section 205 of this title.

"§ 208. Sanctions: criminal fine and civil penalty

"(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

"(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation.

"§ 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided,* That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"§ 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or

orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by an agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the

jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under

the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(3)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review

by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

"§ 212. Personnel

"(a) Any agency or officer of the Government carrying out functions under this title is authorized to employ such personnel as the President deems necessary to carry out the purposes of this title.

"(b) The President may appoint five officers to be responsible for carrying out functions of this title of whom three shall be compensated at the rate prescribed for level III of the Executive Schedule (5 U.S.C. 5314) and two at the rate prescribed for level V of the Execu-

tive Schedule (5 U.S.C. 5316). Appropriate titles and the order of succession among such officers may be designated by the President.

"(c) Any member of a board, commission, or similar entity established by the President pursuant to authority conferred by this title who serves on less than a full-time basis shall receive compensation from the date of his appointment at a rate equal to the per diem equivalent of the rate prescribed for level IV of the Executive Schedule (5 U.S.C. 5315) when actually engaged in the performance of his duties as such member.

"(d)(1) In addition to the number of positions which may be placed in GS-16, 17, and 18, under section 5108 of title 5, United States Code, not to exceed twenty positions may be placed in GS-16, 17, and 18, to carry out the functions under this title.

"(2) The authority under this subsection shall be subject to the procedures prescribed under section 5108 of title 5, United States Code, and shall continue only for the duration of the exercise of functions under this title.

"(e) The President may require the detail of employees from any executive agency to carry out the purposes of this title.

"(f) The President is authorized to appoint, without regard to the civil service laws, such advisory committees as he deems appropriate for the purpose of consultation with and advice to the President in the performance of his functions under this title. Members of advisory committees, other than those regularly employed by the Federal Government, while attending meetings of such committees or while otherwise serving at the request of the President may be paid compensa-

tion at rates not exceeding those authorized for individuals under section 5332 of title 5, United States Code, and, while so serving away from their homes or regular places of business, may be allowed travel expenses, including per diem as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

"(g)(1) Under such regulations as the President may prescribe, officers and employees of the Government who are appointed, without a break of service of one or more work days, to any position for carrying out functions under this title are entitled, upon separation from such position, to reemployment in the position occupied at the time of appointment or in a position of comparable grade and salary.

"(2) An officer or employee who, at the time of his appointment under paragraph (1) of this subsection, is covered by section 8336(c) of title 5, United States Code, shall continue to be covered thereunder while carrying out functions under this title.

"§ 213. Experts and consultants

"Experts and consultants may be employed, as authorized by section 3109 of title 5, United States Code, for the performance of functions under this title, and individuals so employed may be compensated at rates not to exceed the per diem equivalent of the rate for grade 18 of the General Schedule established by section 5332 of title 5, United States Code. Such contracts may be renewed from time to time without limitation. Service of an individual as an expert or consultant under this section shall not be considered as employment or the holding of an office or position bringing such individual within the provisions of section 3323(a)

of title 5, United States Code, section 872 of the Foreign Service Act of 1946, or any other law limiting the re-employment of retired officers or employees.

"§ 214. Small business

"(a) It is the sense of the Congress that small business enterprises should be encouraged to make the greatest possible contribution toward achieving the objectives of this title.

"(b) In order to carry out the policy stated in subsection (a)—

"(1) the Small Business Administration shall to the maximum extent possible provide small business enterprises with full information concerning (A) the provisions of this title relating or of benefit to such enterprises, and (B) the activities of the various departments and agencies under this title;

"(2) in administering this title, such exemptions shall be provided for small business enterprises as may be feasible without impeding the accomplishment of the purposes of this title; and

"(3) in administering this title, special provision shall be made for the expeditious handling of all requests, applications, or appeals from small business enterprises.

"§ 215. Mass transportation systems

"No company, or other entity constituting a public benefit corporation, charged by law or contract with the responsibility to operate a mass transportation facility or facilities, the fares of which are not otherwise regulated, shall increase any fare without first obtaining approval under this section from the President or his delegate.

"§ 216. Reports

"(a) In transmitting the Economic Report required under section 3(a) of the Employment Act of 1946 (15 U.S.C. 1022), the President shall include a section describing the actions taken under this title during the preceding year and giving his assessment of the progress attained in achieving the purposes of this title. The President shall also transmit quarterly reports to the Congress not later than thirty days after the close of each calendar quarter describing the actions taken under this title during the preceding quarter and giving his assessment of the progress attained in achieving the purposes of this title.

"(b) In carrying out his authority under this title, the President shall study and evaluate the relationship between excess profits, the stabilization of the economy, and the creation of new jobs. The results of such study shall be incorporated in the reports referred to in subsection (a).

"§ 217. Funding

"(a) There are authorized to be appropriated to the President, to remain available until expended, such sums as may be necessary to carry out the provisions of this title.

"(b) The President may accept and use in furtherance of the purposes of this title money, funds, property, and services of any kind made available for such purposes by gift, devise, bequest, grant, or otherwise.

"§ 218. Expiration

"The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1973, but such expiration shall not affect any action

or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1973.

"§ 219. Ratification

"The assignment of personnel and expenditure of funds pursuant to the authority conferred on the President by this title prior to the date of enactment of the Economic Stabilization Act Amendments of 1971 are hereby approved, ratified, and confirmed.

"§ 220. Severability

"If any provision of this title or the application of such provision to any person or circumstances is held invalid, the remainder of the title, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

FEDERAL EMPLOYEE COMPENSATION

Sec. 3. Notwithstanding any provision of section 3(c) of the Federal Pay Comparability Act of 1970 (Public Law 91-656), or section 5305 of title 5, United States Code, as added by section 3(a) of Public Law 91-656, and the provisions of the alternative plan submitted by the President to the Congress pursuant thereto on August 31, 1971; such comparability adjustments in the rates of pay of each Federal statutory pay system as may be required under such sections 5305 and 3(c), based on the 1971 Bureau of Labor Statistics survey—

(1) shall not be greater than the guidelines established for the wage and salary adjustments for the private sector that may be authorized under authority of any statute of the United States,

including the Economic Stabilization Act of 1970 (Public Law 91-379; 84 Stat. 799), as amended, and that may be in effect on December 31, 1971; and

(2) shall be placed into effect on the first day of the first pay period that begins on or after January 1, 1972.

Nothing in this section shall be construed to provide any adjustments in rates of pay of any Federal statutory pay system which are greater than the adjustments based on the 1971 Bureau of Labor Statistics survey.

NATIONAL PRODUCTIVITY POLICY

Sec. 4. (a)(1) It is the policy of the United States to promote efficient production, marketing, distribution, and use of goods and services in the private sector, and improve the morale of the American worker, all of which are essential to a prosperous and secure free world, and to achieve the objectives of national economic policy.

(2) The Congress finds that the persistence of inflationary pressures, and of a high rate of unemployment, the underutilization and obsolescence of production facilities, and the inadequacy of productivity are damaging to the effort to stabilize the economy.

(3) The Congress, therefore, finds a national need to increase economic productivity which depends on the effectiveness of management, the investment of capital for research, development, and advanced technology and on the training and motivation of the American worker.

(4) The Congress further finds that at a time when economic stabilization programs require price-wage re-

straints, management and labor have a strong mutual interest in containing "cost-push" inflation and increasing output per man-hour so that real wages may increase without causing increased prices, and that, without in any way infringing on the rights of management or labor, machinery should be provided for translating this mutuality of interest into voluntary action.

(b) It shall be the objective of the President's National Commission on Productivity (hereinafter referred to as the "Commission")—

(1) to enlist the cooperation of labor, management, and State and local governments, in a manner calculated to foster and promote increased productivity through free competitive enterprise toward the implementation of the national policy declared in the Employment Act of 1946 to create and maintain "conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power";

(2) to promote the maintenance and improvement of worker motivation and to enlist community interest in increasing productivity and reducing waste;

(3) to promote the more effective use of labor and management personnel in the interest of increased productivity;

(4) to promote sound wage and price policies in the public interest, and to seek to accomplish that objective within a climate of cooperation and understanding between labor, management, and the public, and within a framework of peaceful

labor-management relations and free and responsible collective bargaining;

(5) to promote policies designed to insure that United States products are competitive in domestic and world markets;

(6) to develop programs to deal with the social and economic problems of employees adversely affected by automation or other technological change or the relocation of industries.

(c)(1) It shall be the duty and function of the Commission, in order to achieve the objectives set forth in subsection (b) of this section, to encourage and assist in the organization and the work of labor-management-public committees and similar groups on a plant, community, regional, and industry basis. Such assistance shall include aid—

(A) in the development of apprenticeship, training, retraining, and other programs for employee and management education for development of greater upgraded and more diversified skills:

(B) in the formulation of programs designed to reduce waste and absenteeism and to improve employee safety and health;

(C) in the revision of building codes and other local ordinances and laws, in order to keep them continuously responsive to current economic conditions;

(D) in planning for provision of adequate transportation for employees;

(E) in the exploration of means to expand exports of the products of United States industry;

(F) in the development, initiation, and expansion of employee incentive compensation, profit-

sharing and stockownership systems and other production incentive programs;

(G) in the dissemination of technical information and other material to publicize its work and objectives;

(H) to encourage studies of techniques and programs similar to those in paragraphs (A) to (G) of this subsection, as they are applied in foreign countries; and

(I) in the dissemination of information and analyses concerning the economic opportunities and outlook in various regions and communities, and of information on industrial techniques designed for the increase of productivity.

(2) The Commission shall transmit to the President and to the Congress not later than March 1 of each year an annual report of its previous year's activities under this Act.

(3) The Commission shall perform such other functions, consistent with the foregoing, as it determines to be appropriate and necessary to achieve the objectives set forth in subsection (b) of this section.

(d)(1) In exercising its duties and function under this Act—

(A) the Commission may consult with such representatives of industry, labor, agriculture, consumers, State and local governments, and other groups, organizations, and individuals as it deems advisable to insure the participation of such interested parties;

(B) the Commission shall, to the extent possible, use the services, facilities, and information

(including statistical information) of other Government agencies as the President may direct as well as of private agencies and professional experts in order that duplication of effort and expense may be avoided;

(C) the Commission shall coordinate such services and facilities referred to in subsection (B) above in order to supply technical and administrative assistance to labor-management-public committees and similar groups referred to in subsection (c)(1);

(D) the Commission shall establish the regional offices and such local offices as it deems necessary;

(E) the Commission shall hold regional and industrywide conferences to formulate ideas and programs for the fulfillment of the objectives set forth in subsection (C);

(F) the Commission may formulate model programs to ameliorate the effects of unemployment caused by technological progress;

(G) the Commission may furnish assistance to parties in collective bargaining entering into collective bargaining agreements; and

(H) the Commission may review collective bargaining agreements already in effect or those being negotiated to ascertain their effects on productivity; and it may have the power to make recommendations with respect to the agreements made or about to be made in specific industries.

(2) The Commission may accept gifts or bequests, either for carrying out specific programs which it deems desirable or for its general activities.

(e)(1) The Executive Director of the Commission shall be the principal executive officer of the Commission in carrying out the objectives, functions, duties and powers of the Commission described in subsections (b) through (d) of this section.

(2) The Executive Director of the Commission, with the approval of the Chairman of the Commission, is authorized (A) to appoint and fix the compensation of such officers and employees, and prescribe their functions and duties, as may be necessary to carry out the provisions of this section, and (B) to obtain the services of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code.

(f) There is hereby authorized to be appropriated the sum of $10,000,000 to carry out the purposes of this section during the period ending April 30, 1973.

Approved December 22, 1971.

2. Economic Stabilization Act Amendments of 1973 (87 Stat. 27).

ECONOMIC STABILIZATION ACT AMENDMENTS OF 1973

For Legislative History of Act, see p. 1117

PUBLIC LAW 93-28, 87 STAT. 27

[S. 398]

An Act to extend and amend the Economic Stabilization Act of 1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That:

This Act may be cited as the "Economic Stabilization Act Amendments of 1973".

AUTHORITY TO ALLOCATE PETROLEUM PRODUCTS

Sec. 2. (a) The first sentence of section 202 of the Economic Stabilization Act of 1970 is amended by striking out the period at the end thereof and inserting in lieu thereof the following: ", and that in order to maintain and promote competition in the petroleum industry and assure sufficient supplies of petroleum products to meet the essential needs of various sections of the Nation, it is necessary to provide for the rational and equitable distribution of those products."

(b) The first sentence of section 203(a) of such Act is amended—

(1) by striking out "and" at the end of clause (1);

(2) by striking out the period at the end of clause (2) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof a new clause as follows:

"(3) provide after public hearing, conducted with such notice, under such regulations and subject to such review as the exigencies of the case may, in his judgment, make appropriate for the establishment of priorities of use and for systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation and to prevent anticompetitive effects resulting from shortages of such products."

DEFINITION OF SUBSTANDARD EARNINGS

Sec. 3. Section 203(d) of the Economic Stabilization Act of 1970 is amended by adding at the end thereof the following new sentence: "The President shall prescribe regulations defining for the purposes of this subsection the term 'substandard earnings', but in no case shall such term be defined to mean earnings less than those resulting from a wage or salary rate which yields $3.50 per hour or less."

CLARIFICATION OF AUTHORITY CONFERRED BY ACT

Sec. 4. Section 203 of the Economic Stabilization Act of 1970 is amended by adding at the end thereof the following new subsection:

"(j) Nothing in this title may be construed to authorize or require the withholding or reservation of any obligational authority provided by law or of any funds appropriated under such authority."

DEFINITION OF WAGES AND SALARIES

Sec. 5. Section 203(g) of the Economic Stabilization Act of 1970 is amended to read as follows:

"(g) For the purposes of this title, the term 'wages' and 'salaries' do not include reasonable contributions by any employer pursuant to a compensation adjustment for—

"(1) any pension, profit sharing, or annuity and savings plan which meets the requirements of section 401(a), 404(a)(2), or 403(b of the Internal Revenue Code of 1954;

"(2) any group insurance plan; or

"(3) any disability and health plan;

unless the President determines that the contributions for such purposes made by any such employer are unreasonably inconsistent with the standards for wage, salary, and price increases issued under subsection (b) or under any other provision of this title. Employees in all industries subject to controls under this title shall be treated equally for purposes of this title."

PUBLIC DISCLOSURE

Sec. 6. Section 205 of the Economic Stabilization Act of 1970 is amended—

(1) by striking "All" and inserting in lieu thereof "(a) Except as provided in subsection (b), all"; and

(2) by adding at the end thereof the following new subsection:

"(b)(1) Any business enterprise subject to the reporting requirements under section 130.21(b) of the regulations of the Cost of Living Council in effect on

January 11, 1973, shall make public any report (except for matter excluded in accordance with paragraph (2)) so required which covers a period during which that business enterprise charges a price for a substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such product on January 10, 1973, or on the date twelve months preceding the end of such period, whichever is later. As used in this subsection, the term 'substantial product' means any single product or service which accounted for 5 per centum or more of the gross sales or revenues of a business enterprise in its most recent full fiscal year.

"(2) A business enterprise may exclude from any report made public pursuant to paragraph (1) any information or data reported to the Cost of Living Council, proprietary in nature, which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures but may not exclude from such report, data, or information, so reported, which concerns or relates to its prices for goods and services.

"(3) Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets,

processes, operations, style of work, or apparatus of the business enterprise."

AGENCY HEARINGS

Sec. 7. Section 207(b) of the Economic Stabilization Act of 1970 is amended by striking out the period at the end thereof and inserting the following in lieu thereof: ": *Provided,* That such agency shall issue no order which has the effect of reducing wages, or salaries in effect, or proposed to be put into effect, in an appropriate employee unit unless such order is made on the record after opportunity for a hearing. Not less than thirty days after issuance of such an order a statement of explanation shall be directed to the affected parties and made available to the public. Such statement shall include a full explanation of the reasons why the existing wage or salary, or proposed wage or salary adjustment, does not meet the requirements of or the standards established by the regulations prescribed by the agency."

EXTENSION OF ACT

Sec. 8. Section 218 of the Economic Stabilization Act of 1970 is amended by striking out "April 30, 1973" and "May 1, 1973" and inserting in lieu thereof "April 30, 1974" and "May 1, 1974", respectively.

Approved April 30, 1973.

3. The Emergency Petroleum Allocation Act of 1973 (87 Stat. 627).

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

For Legislative History of Act, see p. 4436.

PUBLIC LAW 93-159; 87 STAT. 627
[S. 1570]

An Act to authorize and require the President of the United States to allocate crude oil, residual fuel oil, and refined petroleum products to deal with existing or imminent shortages and dislocations in the national distribution system which jeopardize the public health, safety, or welfare; to provide for the delegation of authority; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Emergency Petroleum Allocation Act of 1973".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses,

reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

DEFINITIONS

Sec. 3. For purposes of this Act:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to—

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner),

but who is not affiliated with, controlled by, or under common control with any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B)), and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who (A) is not a refiner, (B) is not a person who controls, is controlled by, is under common control with, or is affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

MANDATORY ALLOCATION

Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for—

(A) protection of public health, safety, and welfare (including maintenance of residential

heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—

(A) a dollar-for-dollar pass-through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

(3) The President in promulgating the regulation under subsection (a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such

other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

(c)(1) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide—

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1,

1974, with respect to any change after calendar year 1972 in—

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum prod-

ucts and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary—

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) The regulation under subsection (a) shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for use

by ultimate users within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b).

(e)(1) The provisions of the regulation under subsection (a) shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b)(1)(E) or the other objectives of subsections (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the President's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence.

(2)(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

(f)(1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If—

(A) an order or regulation under section 203 (a)(3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment of this Act, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a)(3) to the mandatory allocation program required under this Act,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, th effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

(g)(1) The regulation promulgated and made effective under subsection (a) shall remain in effect until midnight February 28, 1975, except that (A) the President or his delegate may amend such regulation so long as such regulation, as

amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petroleum product from regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regulation and to issue any order under this section, and to enforce under section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975.

(2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the

House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.

ADMINISTRATION AND ENFORCEMENT

Sec. 5. (a)(1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

(b) The President may delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

EFFECT ON OTHER LAWS AND ACTIONS TAKEN THEREUNDER

Sec. 6. (a) All actions duly taken pursuant to clause (3) of the first sentence of section 203(a) of the Economic Stabilization Act of 1970 in effect immediately prior to the effective date of the regulation promulgated under section 4(a) of this Act, shall continue in effect until modified pursuant to this Act.

(b) The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

(c)(1) Except as specifically provided in this subsection, no provisions of this Act shall be deemed to convey to any person subject to this Act immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) As used in this subsection, the term "antitrust laws" includes—

(A) the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.);

(B) the Act entitled "An Act to supplement existing laws against unlawful restrains and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.);

(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

(D) sections 73 and 74 of the Act entitled "An Act to reduce taxation, to provide revenue for the

Government, and for other purposes", approved August 27, 1894 (15 U.S.C. 8 and 9); and

(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a).

(3) The regulation promulgated under section 4(a) of this Act shall be forwarded on or before the date of its promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternative which would avoid or overcome such effects while achieving the purposes of this Act.

(4) Whenever it is necessary, in order to comply with the provisions of this Act or the regulation or any orders under section 4 thereof, for owners, directors, officers, agents, employees, or representatives of two or more persons engaged in the business of producing, refining, marketing, or distributing crude oil, residual fuel oil, or any refined petroleum product to meet, confer, or communicate in such a fashion and to such ends that might otherwise be construed to constitute a violation of the antitrust laws, such persons may do so only upon an order of the President (or of an officer or agency of the United States to whom the President has delegated authority under section 5(b) of this Act); which order shall specify and limit the subject matter and objectives of such meeting, conference, or communication. Moreover, such meeting, conference, or communication shall take place only in the presence of a representative of the Antitrust Division of the De-

partment of Justice, and a verbatim transcript of such meeting, conference, or communication shall be taken and deposited, together with any agreement resulting therefrom, with the Attorney General and the Federal Trade Commission, where it shall be made available for public inspection.

(5) There shall be available as a defense to any action brought under the antitrust laws, or for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this Act or with the regulation or any order under section 4 of this Act.

(6) There shall be available as a defense to any action brought under the antitrust laws arising from any meeting, conference, or communication or agreement resulting therefrom, held or made solely for the purpose of complying with the provisions of this Act or the regulation or any order under section 4 thereof, that such meeting, conference, communication, or agreement was carried out or made in accordance with the requirements of paragraph (4) of this subsection.

MONITORING BY FEDERAL TRADE COMMISSION

Sec. 7. (a) During the forty-five day period beginning on the effective date on which the regulation under section 4 first takes effect, the Federal Trade Commission shall monitor the program established under such regulation; and, not later than sixty days after such effective date, shall report to the President

and to the Congress respecting the effectiveness of this Act and actions taken pursuant thereto.

(b) For purposes of carrying out this section, the Federal Trade Commission's authority, under sections 6, 9 and 10 of the Federal Trade Commission Act to gather and compile information and to require furnishing of information, shall extend to any individual or partnership, and to any common carrier subject to the Acts to regulate commerce (as such Acts as defined in section 4 of the Federal Trade Commission Act).

Approved Nov. 27, 1973.

4. Administrative Procedure Act Section 553.

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorpoarate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretation rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

5. State and Local Exemption Under Phase I Regulations (6 C.F.R. § 101.34(a)(2), 37 F.R. 5043, Mar. 9, 1972).

37 F.R. 5043 (March 9, 1972)

§ 101.34 Certain price adjustments.

"(a) *Federal, State, and local governments.*

"(1) . . .

"(2) Price adjustments including rent adjustments by State and local governments for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, facilities, materials, or similar thing of value or utility, performed, furnished, provided, granted, prepared, issued, or transferred including tuition and other charges for schools, colleges, and universities owned or operated by a State and local government; except, however, that fees or charges for health services and for utility services (including gas, electricity, telephone, telegraph, public transportation by vehicle or pipeline, but not including water or sewage disposal services) provided directly or indirectly by a State and local government are not except under the provisions of this section."

6. State and Local Exemption Under Phase IV Price Regulations (6 C.F.R. §§ 150.5(a)(2) and 150 (f)(2), 38 F.R. 21601-21602, Aug. 9, 1973, and 38 F.R. 22119, Aug. 16, 1973).

38 F.R. 21601-21602 (August 9, 1973)

§ 150.54 Certain price adjustments.

"(a) . . .

(2) Prices and fees charged by State and local governments for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, facilities, materials, or similar thing of value or utility, performed, furnished, provided, granted, prepared, issued, or transferred including tuition and other charges for schools, colleges, and universities owned or operated by a State and local government, are exempt, except, however, that fees or charges for health services (but not health service fees levied on all students as a condition of enrollment) are not exempt under the provisions of this section.

". . . (b)

"(f) *Government Property.*

. . .

(2) Prices charged for property sold by the United States, including lease-sales are exempt.

38 F.R. 22119 (August 16, 1973)

§ 150.54 [Amended]

8. Section 150.54(f)(2) is amended by inserting the phrase "or State and local governments" after the word "States".

7. Notice of Proposed Rulemaking of October 25, 1973 (38 F.R. 29618-29619, Oct. 26, 1973).

COST OF LIVING COUNCIL
[6 CFR Part 150]
PHASE IV PRICE REGULATIONS
State and Local Government Sales of
Petroleum Products

Notice is hereby given that, pursuant to the authority of Executive Orders 11695 and 11730, the Cost of Living Council, as part of its continuing review of the operation of price controls with respect to the petroleum industry, is considering the adoption of certain amendments to exclude sales of "covered products" as fined in Subpart L from the exemption of price adjustments. by State and local governments. If ultimately adopted, this regulation would be affective as of 9 a.m., e.s.t. October 25, 1973, the date upon which this notice of proposed rulemaking is filed with the Federal Register. It would occur to any delivery of covered products occurring after that date.

The Council is aware that certain government units as lessors of crude petroleum fields have the option to take royalty payment in kind. Under the existing regulations sales of products including crude petroleum and refined petroleum products by State and local governments are exempt from the Subpart L price ruels for covered prod snU.tcuedr L price rules for covered products. Under the proposed rule, the sale of crude petroleum or refined petroleum by State and local governments would be treated in the same manner as a sale by any other firm and would be subject to the provisions of Subpart L.

In undertaking this rulemaking procedure, the Council wishes to solicit comments on the impact of such a rule both with respect to supply and price stabilzation. The Council is particularly interested in reveiving comments on the proposed rule that focus upon the issues discussed in this notice.

Comments on the magnitude of the impact of the proposed rule in relation to total domestic sales of crude petroleum are of particular interest. Legislation currently pending in Congress proposes to exempt from all price controls the production of crude petroleum from stripper wells. The amount of production which would be affected by such an exemption is substantial, and the removal of the exemption from government sales should be viewed in this light.

Presently, there is a mandatory allocation program for propane and a mandatory allocation program for middle distillates scheduled to take effect on November 1. In addition, there is legislation pending which would impose mandatory controls on the allocation of crude petroleum. The Council is interested in the impact of sales of crude petroleum by states upon the regulatory scheme of any mandatory allocation program.

The effects of possible changes in traditional supply patterns which could result from sales of crude petroleum by states as well as the availability of alternate sources of supply both for the lessee refiners and those purchasing from the states are also matter on which the Council invites comments.

The Council is concerned about the possible impact of the proposed rule in light of the increasingly tight supply situation caused by the recent actions of certain mideast governments with respect to the curtailment of sales of crude petroleum to the United States. These actions complicate the domestic crude petroleum supply

situation, and may directly affect prices for crude petroleum and refined products.

Interested persons are invited to participate in the rulemaking by submitting written data, views or arguments with respect to the proposed regulations set forth in this notice to the Executive Secretariat, Cost of Living Council, 2000 M Street NW., Washington, D.C. 20508.

Comments should be identified on the outside envelope and on the document submitted with the designation "Proposed Phase IV Petroleum Amendments." Ten copies should be submitted. All comments received by November 24, 1973, will be considered by the Council before final action is taken on the proposed regulation. The proposed regulation may be changed in light of the comments received. All comments received in response to this notice will be available for examination and copying by interested persons at the Cost of Living Council, 2000 M. Street NW., Washington, D.C. 20508, during the hours of 9 a.m. to 5 p.m., Monday through Friday, Submission may be inspected both before and after the ending date for comment.

(Economic Stabilization Act of 1970; as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, Stat. 27; E.O. 11695, 38 FR 1473; E.O 11730, 38 FR 19345; Cost of Living Council Order No. 14, 38 FR 1489.)

PROPOSED RULES

In consideration of the foregoing it is proposed to amend Part 150 of Title 6 of the Code of Federal Regulations as set forth below.

Issued in Washington, D.C., 9 a.m., e.s.t., October 25, 1973.

John T. Dunlop,
Director,
Cost of Living Council.

Paragraph 1. The exemption of certain price adjustments by State and local governments is amended to exclude sales of "covered products" as defined in Subpart L.

§ 150.54 Certain price adjustments.

(a) *Federal and State and local governments.* * * *

(2) Prices and fees charged by State and local governments for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, facilities, materials, or similar thing of value or utility, performed, furnished, provided, granted, prepared, issued, or transferred including tuition and other charges for schools, colleges, and universities owned or operated by a State and local government, are exempt, except, however, that prices charged for sales of "covered products" as defined in Subpart L, and fees or charges for health services (but not health service fees levied on all students as a condition of enrollment) are not exempt under the provisions of this section.

* * *

(f) *Government property.* * * *

(2) Prices charged for property sold by the United States or State and local governments, including lease-sales are exempt, except however, that prices charged by state and local governments for sales of "covered products" as defined in Subpart L are not exempt under the provisions of this section.

[FR Doc. 73-22984 Filed 10-25-73; 10:47 am]

8. President's Delegation of Authority to FEO of December 4, 1973 (38 F.R. 33575-33576, Dec. 6, 1973).

PRESIDENTIAL DOCUMENTS

Title 3—The President

EXECUTIVE ORDER 11748

Federal Energy Office

By virtue of the authority vested in me as President of the United States of America by the Constitution and statutes of the United States, including the Economic Stabilization Act of 1970 (P.L. 91-379, 84 Stat. 799), as amended, the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159), the Defense Production Act of 1950 (50 U.S.C. App. 2061, *et seq.*), as amended, and Section 301 of title 3 of the United States Code, it is hereby ordered as follows:

Section 1. There is hereby established in the Executive Office of the President a Federal Energy Office. The Office shall be under the immediate supervision and direction of an Administrator and a Deputy Administrator of the Federal Energy Office. The Administrator shall be the Deputy Secretary of the Treasury.

Sec. 2. The Administrator of the Federal Energy Office shall advise the President with respect to the establishment and integration of domestic and foreign policies relating to the production, conservation, use, control, distribution, and allocation of energy and with respect to all other energy matters.

Sec. 3(a) There is hereby delegated to the Administrator all the authority vested in the President by the Emergency Petroleum Allocation Act of 1973.

(b) The Administrator shall either submit to the Congress the reports required by Section 4(c)(2) of the Emergency Petroleum Allocation Act, or may require any other officer or any department or agency of the United States to submit the required reports to Congress.

Sec. 4(a) There is hereby delegated to the Administrator the authority vested in the President by Section 203(a)(3) of the Economic Stabilization Act of 1970, as amended.

(b) The Chairman of the Cost of Living Council shall, from time to time, delegate to the Administrator such authority under the Economic Stabilization Act as may be necessary to carry out the purposes of that Act with respect to energy matters.

Sec. 5. There is hereby delegated to the Administrator the authority vested in the President by the Defense Production Act of 1950, as amended, as it relates to the production Act of 1950, as amended, as it relates to the production, conservation, use, control, distribution, and allocation of energy. Any provision of Executive Order No. 10480, as amended, which is inconsistent with the exercise of such authority is hereby suspended for so long as this Section remains in effect.

Sec. 6. Executive Order No. 11726 of June 29, 1973, is hereby superseded to the extent that it is inconsistent with this Order.

Sec. 7. All Orders, regulations, circulars, or other directives issued and all other actions taken pursuant to any authority delegated to the Administrator by this Order prior to and in effect on the date of this Order are hereby confirmed and ratified, and shall remain in full force and effect, as if issued under this Order un-

less or until altered, amended, or revoked by the Administrator or by such competent authority as he may specify.

Sec. 8. All authority delegated to and placed in the Administrator by this Order may be further delegated, in whole or in part, by the Administrator to any other officer or any department or agency of the United States.

Sec. 9(a) Necessary expenses of the Federal Energy Office may be paid from the Emergency Fund of the President or from such other funds as may be available.

(b) The Administrator of the General Services Administration shall provide, on a reimbursable basis, such administrative support as may be needed by the Federal Energy Office.

(c) All departments and agencies of the executive branch shall, to the extent permitted by law, provide assistance and information to the Administrator of the Federal Energy Office.

Richard Nixon

[Signed]

THE WHITE HOUSE,
December 4, 1973.

[FR Doc. 73-26073 Filed 12-5-73; 10:39 am]

Note: For the President's remarks of December 4, 1973, concerning Executive Order 11748, above, see Weekly Comp. of Pres. Docs., vol. 9, no. 49, issue of December 10, 1973.

9. Price Regulations Promulgated by FEO on December 11, 1973 (38 F.R. 34433-34434, Dec. 13, 1973).

PART 201—MANDATORY PETROLEUM ALLOCATION PRICE REGULATIONS

Subpart A—General

Sec.

201.1 Scope.

201.2 Applicability.

201.3 Definitions.

Subpart B—Specific Price Regulations

201.4 Price rule.

Authority: Economic Stabilization Act of 1970 as amended by the Economic Stabilization Act Amendments of 1973, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28; 87 Stat. 27; Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33575.

Subpart A—General

§ 201.1 Scope.

This part sets forth the pricing rules applicable to the purchase or sale of covered products.

§ 201.2 Applicability.

This part applies to each economic unit or transaction in the United States to the extent that covered products are involved.

§ 201.3 Definitions.

As used in this part (a) "Covered Products" means products described in the 1972 Standard Industrial Classification Manual, Industry Code 1311, 1321, or 2911 (except natural gas).

"United States" means the several States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Subpart B—Specific Price Regulations

§ 201.4 Price rule.

With respect to economic units and transactions subject to this part, the maximum price which a seller may charge and a buyer may pay is the price permitted pursuant to the provisions set forth in Part 150 of Title 6 of the Code of Federal Regulations.

10. Delegation Order 47 (39 F.R. 24, January 2, 1974).

COST OF LIVING COUNCIL

[Cost of Living Council Order No. 47]

ADMINISTRATOR, FEDERAL ENERGY OFFICE

Delegation of Authority

Executive Order 11748 which established the Federal Energy Office:

(a) Delegated to the Administrator of the Federal Energy Office authority to implement the allocation and price stabilization provisions of the Emergency Petroleum Allocation Act of 1973.

(b) Delegated to the Administrator the allocation authority with respect to petroleum products and crude oil contained in section 203(a)(3) of the Economic Stabilization Act of 1970, as amended.

(c) Ratified and continued in effect the actions previously taken under section 203(a)(3) of the Economic Stabilization Act of 1970, as amended.

(d) Directed the Chairman of the Cost of Living Council to delegate, from time to time, such authority under the Economic Stabilization Act as may be necessary to carry out the purposes of that Act with respect to energy matters.

Pursuant to that directive, it is the purpose of this order to delegate to the Administrator price stabilization authority under the Economic Stabilization Act with respect to petroleum products and crude oil as set forth below and thus to centralize in one agency price stabilization and allocation authority with respect to these products.

Therefore, pursuant to the authority vested in me as Chairman of the Cost of Living Council by Executive Order 11695, as continued by Executive Order 11730, and pursuant to the directive in section 4(b) of Executive Order 11748 it is hereby ordered as follows:

1. Except as provided in paragraphs 2, 3, 4, and 5 of this order, there is hereby delegated to the Administrator of the Federal Energy Office authority to make determinations and take actions required or permitted by the Economic Stabilization Act of 1970, as amended, with respect to petroleum products and crude oil and the leasing of real property used in the retailing of gasoline.

For the purposes of this order petroleum products and crude oil means products described in the 1972 edition, Standard Industrial Classification Manual, under Industry Codes 1311 (except natural gas), 1321 or 2911.

2. The authority delegated in paragraph 1 of this order does not include any authority, duty or responsibility with respect to the stabilization of wages or salaries.

3. The authority delegated in paragraph 1 of this order includes the authority to make determinations and take actions with respect to request for exceptions filed after December 21, 1973. It does not include such authority with respect to requests for exceptions filed on or before that date.

4. The authority delegated in paragraph 1 of this order does not include any authority, duty or responsibility with respect to the petrochemical industry.

5. The authority delegated in paragraph 1 of this order includes the authority to make determinations and take actions with respect to Phase II, Phase III and Phase IV compliance and enforcement cases re-

ceived by the Council from the Internal Revenue Service after December 21, 1973. It does not include such authority with respect to cases received on or before that date.

6. All orders, regulations, circulars or other directives issued and all other actions taken pursuant to any authority delegated to the Administrator by this order prior to and in effect on the date of this order are hereby confirmed and ratified, and shall remain in full force and effect, as if issued under this order, unless or until altered, amended or revoked by the Administrator or by such competent authority as he may specify.

7. All authority delegated to and placed in the Administrator by this order may be further delegated, in whole or in part, by the Administrator to any other officer of any department or agency of the United States.

8. The Administrator and the Director of the Cost of Living Council shall provide for the orderly transfer from the Cost of Living Council to the Federal Energy Office such of the Council's activities relating to petroleum products and crude oil and the leasing of real property used in the retailing of gasoline as they may find necessary or appropriate. During the transition period the Cost of Living Council will continue to support energy related activities.

9. Cost of Living Council Orders No. 39 and 44 are hereby rescinded.

10. This order shall be effective on December 26, 1973.

DATED: December 26, 1973.

George P. Shultz,
Chairman,
Cost of Living Council.

[FR Doc. 73-27292 Filed 12-28-73; 3:31 pm]

11. Price Regulations Adopted by FEO on December 27, 1973 (39 F.R. 761, Jan. 2, 1973).

PART 201—MANDATORY PETROLEUM ALLOCATION PRICE REGULATIONS

Subpart A—General

Sec.

201.1 Scope
201.2 Applicability.
201.3 Definitions.

Subpart B—Specific Price Regulations

201.4 Price rule.

Authority: Economic Stabilization Act of 1970 as amended by the Economic Stabilization Act Amendments of 1973, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28; 87 Stat. 27; Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11743, 38 FR 33575.

Subpart A—General

§ 201.1 Scope.

This part sets forth the pricing rules applicable to the purchase or sale of covered products.

§ 201.2 Applicability.

This part applies to each economic unit or transaction in the United States to the extent that covered products are involved.

§ 201.3 Definitions.

As used in this part (a) "Covered Products" means products described in the 1972 Standard Industrial Classification Manual, Industry Code 1311, 1321, or 2911 (except natural gas).

"United States" means the several States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Subpart B—Specific Price Regulations

§ 201.4 Price rule.

With respect to economic units and transactions subject to this part, the maximum price which a seller may charge and a buyer may pay is the price permitted pursuant to the provisions set forth in Part 150 of Title 6 of the Code of Federal Regulations, except to the extent inconsistent with price regulations in this chapter.

12. Excerpts From Petroleum Allocation and Price Regulations Issued by the FEO on January 14, 1974 (Summary, and 10 C.F.R. Chapter II, §§ 205.201(a), 212.52(b), and 212.74(a)-39 F.R. 1924, 1930, and 1952, Jan. 15, 1974).

39 F.R. 1924, January 15, 1974
Title 10—Energy

CHAPTER II—FEDERAL ENERGY OFFICE ALLOCATION AND PROCEDURAL REGULATIONS

The purpose of this amendment is to revise Chapter II of Title 10 of the Code of Federal Regulations.

A notice of proposed rulemaking containing a Proposed Mandatory Petroleum Products Allocation Program was issued on December 12, 1973 (38 FR 34414, December 13, 1973). Revised regulations were issued on December 27, 1973 (39 FR 744, January 2, 1974), which were not to be implemented until January 15, 1973. Publication of those subparts controlling the allocation of propane, motor gasoline and middle distillates was deferred until January 11, 1973 with a further delayed implementation date.

The new mandatory allocation program for these petroleum products is contained in Subparts D, F and G of Part 211. In addition, Parts 200, 201 and 202 of the December 27, 1973 regulations are revoked and new parts issued which contain the material previously located in Parts 200, 201 and 202. The regulations published herein constitute a total revision of the Mandatory Petroleum Products Allocation Program and supersedes all the provisions of this chapter which were effective prior to January 15, 1973.

Part 205 contains the procedural regulations previously located in Part 202. The changes in the administrative procedures which have been adopted in Part 205 should simplify the procedural process and provide a vehicle for the public to interact with the FEO and participate in the decision-making process.

The Freedom of Information Act regulations which were previously combined with the procedural regulations in Part 202 have been separated from these regulations in this revision. The Federal Energy Office will issue a new Part 202 in a few days which will contain the rules governing public access to information.

A new Part 210 has been created establishing the general rules which apply to both the price control and allocation programs. This part extracts sections previously located in Subpart A of Part 200 and in the Phase IV Price regulations in 6 CFR Part 150.

The creation of Part 210 recognizes the compelling necessity of viewing both allocation and price problems within the context of a single regulatory framework.

Part 211 contains all the purely allocation provisions which had previously been located in Part 200. Whereas Part 201 previously incorporated by reference the Phase IV pricing regulations found 6 CFR Part 150, the new Part 212 republishes these regulations in full. Persons subject to the price and allocation regulations will now be able to have a single readily available source of information as to the rules established to govern this program.

Due to the fact that a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise, the Federal Energy Office is inviting comment on these regulations. Although *no specific future changes are currently anticipated,* the Federal Energy Office would appreciate all comments or suggestions which might assist in future improvements to the program. Comments should be submitted in at least ten copies, clearly labeled on the envelope "Comments on Regulations." The mailing address is Executive Secretariat, Federal Energy Office, Washington, D.C. 20461. Submission of comments before January 31, 1974 is encouraged.

(Emergency Petroleum Allocation Act of 1973, P.L. 93-159, E.O. 11748, 38 FR 33577; Economic Stablization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11748, 38 FR 33575; Cost of Living Council Order Number 47, 38 FR 24)

In consideration of the foregoing, Chapter II of Title 10 of the Code of Federal Regulations is revised as set out herein, effective 11:59 p.m., d.s.t., January 14, 1974.

Issued in Washington, D.C. on January 14, 1974.

JOHN C. SAWHILL,
Deputy Administrator,
Federal Energy Office.

* * *

". . ."

39 F.R. 1930, January 15, 1974

Subpart k—Petition and Comment on Rulemaking

§ 205.201 Purpose and scope.

(a) The provisions of 5 U.S.C. 553 will be followed for the issuance of all regulations or amendments to regulations by the FEO to the extent such provisions apply.

(b) In addition, FEO will accept from interested persons written objections to its regulations or its published rulings at any time. If in the opinion of the FEO such comments or objections warrant a proceeding similar to a rule making proceeding as provided by 5 U.S.C. 553, the FEO will conduct such a proceeding pursuant to notice published in the FEDERAL REGISTER.

* * *

39 F.R. 1952, January 15, 1974

212.52 Federal and State and local governments.

"(a) . . .

"(b) *State and Local Governments.*

Prices charged for any sale, lease or lease-sale of a covered product by State and local governments are exempt.

13. Revocation of State and Local Exemption by FEO on February 21, 1974 (39 F.R. 7176-7177, Feb. 25, 1974).

Title 10—Energy

CHAPTER II—FEDERAL ENERGY OFFICE
PART 212—MANDATORY PETROLEUM PRICE REGULATIONS

Removal of Exemption for State and Local Government Sales

On October 25, 1973, the Cost of Living Council issued a notice of proposed rule making proposing to remove the exempt status for prices charged by State and local governments in sales of "covered products," as defined in the Cost of Living Council Regulations, 6 CFR Part 150, Subpart L. Pursuant to Delegation Order Number 47 issued by the Council on December 26, 1973 (39 FR 24) the Federal Energy Office assumed responsibilities for price regulation of "covered products," as now defined in the FEO Regulations, 10 CFR 212.31, including the outstanding rule making proposal. The price exemption for sales by State and local governments was provided for at 6 CFR 150.54 in the Cost of Living Council Regulations and is now provided for at 10 CFR 212.52(b) of the FEO regulations.

The FEO has reviewed the comments that were submitted and has concluded that the sale of covered products, including crude oil, by State and local governments should not be exempt from the price regulations of Part 212.

In its notice initiating this rule making proceeding, the Cost of Living Council indicated that it was aware that certain government units as lessors of crude

petroleum fields had the option to take royalty payment in kind and that under the existing regulations the sales of products including crude petroleum and refined petroleum products were exempt from price regulation. The proposed rule change would result in such sales being treated just as sales by any other firm. Comments were solicited on the impact of the proposed rule change on supply and price stabilization, and, more specifically, on the impact of the proposed rule on total domestic sales of crude petroleum, on the regulatory scheme of a mandatory allocation program, on possible changes in traditional supply patterns, and the impact in light of the curtailment of sales of foreign crude petroleum to the United States.

Comments submitted in this proceeding indicate that, although exact figures were not supplied, the quantity of crude oil being taken in kind and sold by State or local governments is a relatively small portion of the overall amount of crude oil being purchased in the United States. The FEO does not believe that the relatively small quantities of crude oil that are involved at present provide a sufficient basis for continuing the exemption, however, in light of further considerations described below.

Insofar as the FEO can determine, the price exemption has no significant impact on the supply of crude oil, since royalty crude oil typically represents a specified percentage of the production under a lease, where the amount produced is independent of the prices that can be obtained by a State or local government for its royalty crude oil. Thus, there is no basis for continuing the exemption in order to encourage additional domestic production of crude oil. This is in contrast to the exemption from price regulation provided for by the

Congress for crude oil produced by "stripper well" leases, and the exemption provided by the regulations for so-called "new" oil. Both of these exemptions are designed to stimulate domestic oil production.

The Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, enacted after this rulemaking proceeding was initiated, on November 27, 1973, has among its objectives the minimizing of dislocations in the national distribution system of crude oil and refined petroleum products. The FEO finds that the price exemption for the sale of covered products, particularly crude oil, by State and local governments, if it is not removed, would tend to have a disruptive impact on the national distribution system. Substantially higher prices can now be obtained for crude oil at wholly uncontrolled prices than can be obtained for domestically produced crude oil which, except for new oil and stripper well oil, is subject to ceiling prices. It appears that much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay the substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the Act, would not be adequately accomplished unless the exemption is removed.

A further reason for eliminating the exemption is to eliminate the opportunity and incentive for State and local governments to seek to enter into agreements or arrangements regarding the sale of covered products

which they would not otherwise enter into, and which could tend to result into further dislocations in the national distribution system which the Act seeks to preserve. Thus, for example, concern has been expressed that some States and local governments which have not done so to date have now begun to consider taking royalty oil in kind in order to reap the benefits of the sharply higher uncontrolled price of uncontrolled oil. This practice would tend to undermine existing supplier relationships and magnify the inflationary effects of the exemption.

Certain government units have urged that removal of the exemption would deprive them of added revenues. The FEO has concluded, however, that substantial additional revenues have already been realized by State and local governments from royalty crude oil due to the increases in the crude oil ceiling prices pursuant to the provisions of Subpart D of 10 CFR Part 212. The FEO believes that the still further revenues obtainable through the sale of crude oil at uncontrolled prices would represent, in effect, windfall revenues for those State and local governments having crude oil interests, at the expense of the adverse impact on the overall objectives of Act, as discussed above.

The Notice of proposed rulemaking explicitly provided that "if ultimately adopted, this regulation would be effective as of 9:00 a.m. e.s.t., October 25, 1973, the date on which this notice is filed with the Federal Register. It would apply to any delivery of covered products occurring after that date." Accordingly, the change in regulations adopted herein is effective and applies to all sales of covered products by State and local governments on or after 9:00 a.m., e.s.t., October 25, 1973.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33575; Economic Stabilization Act of 1970, as amended, Pub. L. 92-910, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11730, 38 FR 19345; Cost of Living Council Order Number 47, 39 FR 24).

In consideration of the foregoing, Part 212, Title 10 of the Code of Federal Regulations is amended by deleting § 212.52(b).

Issued in Washington, D.C., February 21, 1974.

WILLIAM N. WALKER,
General Counsel,
Federal Energy Office.

[FR Doc. 74-4515 Filed 2-21-74; 5:01 pm]

14. Notice of Public Hearing Issued by FEO on March 5, 1974 (39 F.R. 8996-8997, Mar. 7, 1974).

FEDERAL ENERGY OFFICE

Proposed Reconsideration of Price Controls on Petroleum Products Leased or Sold by State or Local Governments

Notice of Public Hearing

Notice is hereby given that the Federal Energy Office will hold a public hearing beginning at 10:00 a.m., on Wednesday, March 13, 1974 at the New Post Office Building, 12th and Pennsylvania Avenue NW., Washington, D.C. in the Administrator's press conference room, third floor, to receive comments from interested persons on whether or not the Federal Energy Office should reconsider the amendment to 10 CFR § 212.52(b) issued on February 21, 1974. The amendment withdrew an exemption from price controls and prices charged for any sale, lease or lease-sale of a covered product by a State or local government which had been carried forward from the Phase IV Cost of Living Council regulations. Withdrawal of the exemption was accomplished pursuant to a notice of proposed rulemaking, proposing the exemption, issued on October 25, 1973, by the Cost of Living Council which then had price stabilization authority over the petroleum industry. The record of this rulemaking is available for public inspection between the hours of 8:30 a.m. and 5:30 p.m. in Room 3130 at the New Post Office Building during regular business hours.

This public hearing will be conducted under the authority of § 5 of the Emergency Petroleum Allocation

Act and § 207(c) of the Economic Stabilization Act of 1970, as amended.

The Federal Energy Office is inviting public participation in the form of written submissions as well as oral presentations. Such written submissions must be received by the Federal Energy Office not later than 5:00 p.m., e.d.s.t., March 15, 1974.

All written submissions should be sent to State Royalty Crude Hearings, Box AB, Executive Secretariat, Federal Energy Office, Washington, D.C. 20461. All written submissions received before 5:00 p.m., e.d.s.t., March 15, 1974, will be made part of the official record of the hearing.

Any information or data considered by the person furnishing it to be confidential must be so indicated and submitted in writing, one copy only, before the person's scheduled appearance, or by March 15, 1974, as applicable. The Federal Energy Office reserves the right to determine the confidential status of the information or data and to treat it accordingly.

Any person who has an interest in the subject of the hearing, or who is a representative of a group or class of persons which has an interest in the subject of the hearing, may request the opportunity to make an oral presentation by telephoning the Executive Secretariat of Federal Energy Office at (202) 961-6061 before noon, e.d.s.t., Monday, March 11, 1974. The person making the request should be prepared to describe the interest concerned; if appropriate to state why he is a proper representative of a group or class of persons which has such an interest; and to give a concise summary of the proposed oral presentation and a phone number where he may be contacted through

March 12, 1974. Oral presentations may be supplemented by written submissions filed with the Federal Energy Office not later than March 15, 1974.

The Federal Energy Office reserves the right to select the persons to be heard at the hearing, to schedule their respective presentations, and to establish the procedures governing the conduct of the hearing. Each presentation may be limited, based on the number of persons requesting to be heard.

Each person selected to be heard will be so notified by the Federal Energy Office before 5:00 p.m., e.d.s.t., March 11, 1974, and must send 100 copies of his statement to the Executive Secretariat, Room 3315, New Post Office Building, Washington, D.C. 20461, before 5:00 p.m., e.d.s.t., March 12, 1974.

A Federal Energy Office official will be designated to preside at the hearing. It will not be a judicial- or evidentiary-type hearing. Questions may be asked only by those conducting the hearing, and there will be no cross-examination of persons presenting statements. Any decision made by the Federal Energy Office with respect to the subject matter of the hearing will be based on all information available to the Federal Energy Office, from whatever source received. At the conclusion of all initial oral statements, each person who has made an oral statement will be given the opportunity if he so desires, to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made and may not exceed 10 minutes each.

Any interested person may submit questions, to be asked of any person making a statement at the hearing to the Executive Secretariat before 5:00 p.m., e.d.s.t.,

March 12, 1974. Any person who makes an oral statement and who wishes to ask a question at the hearing may submit the question, in writing, to the presiding officer. The Federal Energy Office, or the presiding officer if the question is submitted at the hearing, will determine whether the question is relevant, and whether time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and the entire record of the hearing, including the transcript, will be retained by the Federal Energy Office and made available for inspection at the Public Reference Facility of the Federal Energy Office, Room 3130, New Post Office Building, 12th and Pennsylvania Avenue NW, Washington, D.C., between the hours of 8:30 a.m. and 5:30 p.m. Monday through Friday. Anyone may buy a copy of the transcript from the reporter.

Issued at Washington, D.C. on March 5, 1974.

WILLIAM N. WALKER,
General Counsel.

[FR Doc. 74-5508 Filed 3-6-74; 12:18 pm]

15. Ruling on Removal of Exemption Issued by FEO on April 2, 1974 (39 F.R. 12252-12255, April 4, 1974).

Title 10—Energy

CHAPTER II—FEDERAL ENERGY OFFICE

Part 212—MANDATORY PETROLEUM PRICE REGULATIONS

Removal of Exemption for Federal, State and Local Government Sales

The Federal Energy Office, having considered the submissions made by interested parties, including presentations made through rulemaking and public hearing procedures, had decided to sustain with slight change, the February 21, 1974 amendment to its regulations removing the exemption for prices charged by State and local governments in sales of covered products, including crude oil. (39 FR 7176, February 25, 1974). FEO also has decided to remove the exemption for prices charged by the Federal government in the sale of covered products.

I. *Introduction.* By a notice of proposed rulemaking dated October 25, 1973 (38 FR 29618, October 26, 1973), the Cost of Living Council announced that it was proposing to remove the exemption for prices charged by State and local governments in sales of covered products, which had been defined to include crude oil, residual fuel oil and refined petroleum products. At that time, the Cost of Living Council had price stabilization authority over most sectors of the economy, including the petroleum industry. Under the Cost of Living Council's Phase IV Regulations, prices charged for products sold and services rendered by State and local governments were, except for fees or charges for

health services, exempt from price regulations. (10 CFR 150.54(a)(2)). In its notice initiating this rulemaking proceeding on October 25, 1973, the Council explicitly stated that, if adopted, the new rules would apply to all deliveries of covered products on and after that date.

The Council's notice solicited comments on the proposed rule with regard to its impact on the following: (1) The regulatory scheme of a mandatory allocation program (At the time a mandatory allocation program existed only for propane and a program for distillates was scheduled to begin on November 1, 1973. The Emergency Petroleum Allocation Act was still pending before Congress.), (2) supply and price stabilization, (3) total domestic sales of crude petroleum, (4) possible changes in traditional supply patterns, and (5) the curtailment of sales of foreign crude petroleum to the United States.

The Cost of Living Council stated in its notice of proposed rulemaking that "All comments received by November 24, 1973 will be considered by the Council before action is taken on the proposed regulation." (38 FR 29618) On November 27, 1973, the Emergency Petroleum Allocation Act of 1973 (Pub. L. 93-159) was enacted, which granted to the President broad regulatory powers over the allocation and pricing of crude oil, residual fuel oil, and refined petroleum products.

The President established the Federal Energy Office and delegated to it authority under the Act by Executive Order on December 4, 1973 (Executive Order No. 11748). The Act (section 4(a)) required allocation and price regulations to be promulgated within

fifteen days of the date of enactment (December 11, 1973), and to be adopted, with certain exceptions, not later than fifteen days after promulgation (December 27, 1973).

The FEO promulgated proposed allocation and price regulations on December 11, 1973, as required by the Act, which, with respect to the price regulations, proposed to incorporate by reference the Phase IV petroleum price regulations of the Cost of Living Council, which still included the general exemption for prices charged by State and local governments.

(38 FR 34414)

On December 26, 1973, the Cost of Living Council delegated to FEO its responsibility for the price regulation of petroleum products (Cost of Living Council Delegation Order No. 47, 39 FR 24, January 2, 1974). Pursuant to this delegation, the FEO also assumed responsibility for the outstanding rulemaking proposal regarding prices charged for such products by State and local governments.

The proposed regulations promulgated by the FEO on December 11, 1973 were adopted, as required under the Act, on December 27, 1973, and, with respect to price regulations, the December 27, 1973 FEO regulations incorporated by reference the price regulations for petroleum products which had formerly been a part of the Cost of Living Council regulations.

(38 FR 35306, Dec. 27, 1973; 39 FR 744, Jan. 2, 1974)

The FEO announced that the regulations adopted December 27, 1973 were to be implemented on January 15, 1974. On January 14, 1974, before the implementation date, FEO issued revised regulations, cov-

ering both allocation and price, which became effective on January 15, 1974. In contrast to the December 11 and December 27 regulations, which had incorporated by reference the Cost of Living Council's Phase IV petroleum price regulations in Title 6, Code of Federal Regulations, the January 15 regulations set forth the full text of the price regulations in 10 CFR Part 212, along with all the other regulations of FEO. The preamble stated that this was done to enable "[p]ersons subject to the price and allocation regulations * * * to have a single readily available source of information as to the rules * * *

(39 FR 1924, January 15, 1974)

In republishing these price regulations, FEO made no substantive changes, except to include certain pricing rules which had formerly been incorporated in the earlier allocation regulations. The only other changes were to eliminate cross reference to the general Cost of Living regulations in other subparts of Title 6, and to conform the sections to the FEO regulations with respect to numbering of sections, cross-referencing, etc. The objective was to make the regulations easier to use by having them appear totally in a single issue of the Federal Register, and also under the same Title of the Code of Federal Regulations. The exemption for prices charged by Federal, State and local governments which had been provided for generally in the Cost of Living Council Regulations in a subpart other than the subpart on petroleum product prices, was included in the FEO subpart on prices in order to eliminate a cross reference to the Cost of Living Council Regulations.

As a result of the foregoing sequence of events, consideration of the comments submitted in this rulemaking

was necessarily deferred until after the basic regulatory framework called for by the Act had been formulated and put into effect. FEO assumed responsibility for the pending rulemaking proceeding as a piece of unfinished business and turned to it as soon as reasonably practicable under the circumstances.

On February 21, 1974, after having considered the comments submitted to the Cost of Living Council and other relevant information. FEO issued an amendment to its regulations which withdrew the exemption from price controls for prices charged for the sale of covered products, including crude oil, by State and local governments. As stated in the original notice, the effective date was October 25, 1973.

(39 FR 7176, February 25, 1974)

II. *This proceeding.* After the amendment was published, representatives of various affected governmental units voiced objections to the decision. FEO concluded that it would be desirable to have a full public airing of the issue and on March 7, 1974 published a notice of public hearing on whether its action of February 21, 1974 should be reconsidered (39 FR 8996, March 7, 1974). Most of the known parties were verbally notified of the hearing prior to the March 7 publication. A public hearing, at which all those who requested to be heard were given an opportunity to appear, was held March 13, 1974. Those who appeared at the hearing included representatives of the States of California, Louisiana and Texas; the Cities of Long Beach and Newport Beach, California; the Joint Committee on Public Domain of the California Legislature; the Independent Refiners Association of California and eight members individually; the Golden Eagle Refining

Company; the Union Oil Company; and the Signal Oil and Gas Company.

FEO has now considered the information submitted at the hearing and during the comment period and has concluded that its action of February 21, 1974 removing the exemption for State and local governments was substantially correct and should be only slightly modified as set forth hereinbelow.

III. *Rationale*—1. *The exemption creates no new incentive for greater production of crude oil supplies.* In the preamble to the February 21, 1974 amendment, FEO stated:

Insofar as the FEO can determine, the price exemption has no significant impact on the supply of crude oil, since royalty crude oil typically represents a specified percentage of the production under a lease, where the amount produced is independent of the prices that can be obtained by a State or local government for its royalty crude oil. Thus, there is no basis for continuing the exemption in order to encourage additional domestic production of crude oil. This is in contrast to the exemption from price regulation provided for by the Congress for crude oil produced by "stripper well" leases, and the exemption provided by the regulations for so-called "new" oil. Both of these exemptions are designed to stimulate domestic oil production. (31 FR 3176).

This rationale was not seriously disputed in these proceedings. Several of the State and local government representatives contended that receipt of increased revenues from the sale of crude oil at uncontrolled prices would result in increased production because some portion of the revenues could be used to install improved

production facilities which would extend the useful life of the fields. But this argument proves too much, because the same rationale, to the extent it has validity, applies to all domestic crude oil production which is currently subject to price controls. If FEO were to accept this argument as applied to these public producers, it would have to apply the same test to private producers as well. This line of reasoning would compel FEO to entirely dismantle its crude oil price control system. There is serious question as to FEO's statutory authority to take such a step except in accordance with the exemption procedure set out in section 4(g) of the Emergency Petroleum Allocation Act, which requires a series of findings by the Administrator and a period of review by both Houses of Congress. Without reaching the legal issue, however, FEO does not believe such action would constitute wise public policy.

The State of Texas contended that the question of whether domestic production would be encouraged by the exemption is irrelevant because "encouraging additional production had never been assigned as a reason for granting the exemption in the first place." But it is a fundamental precept of administrative law that an agency may alter the regulatory scheme it is administering, within the confines of its statutory authority, to better achieve its statutory objectives. As the earlier discussion demonstrates the October 25, 1973 notice of rulemaking to eliminate the exemption in the petroleum industry coincided with the advent of a comprehensive regulatory scheme for petroleum product prices and allocation. This notice signified a recognition that with respect to the regulation of petroleum products, the basis for the exemption should be reconsidered.

2. *The exemption would be harmful to the competitive position of the independent refiners.* In its preamble to its February 21, 1974 amendment, the FEO stated:

The Emergency Petroleum Allocation Act of 1973. Pub. L. 92-150, enacted after this rulemaking proceeding was initiated, on November 27, 1973, has among its objectives the minimizing of dislocations in the national distribution system of crude oil and refined petroleum products. The FEO finds that the price exemption for the sale of covered products, particularly crude oil, by State and local governments, if it is not removed, would tend to have a disruptive impact on the national distribution system. Substantially higher prices can now be obtained for crude oil at wholly uncontrolled prices than can be obtained for domestically produced crude oil which, except for new oil and stripper well oil, is subject to ceiling prices. It appears that much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the Act, would not be adequately accomplished unless the exemption is removed. (31 FR 3176)

The testimony and written comments indicated that amounts of royalty oil involved if sold at exempt prices, would have a substantial impact on the refiners that purchase the royalty oil and a measurable impact on the prices paid by consumers of the end-product.

No data was available on the overall amount of crude oil owned by Federal, state and local governments. The amount of crude oil made available for sale by State and local governments currently includes 23,000 barrels per day by the State of Texas, and 80,000 barrels per day by the State of Louisiana. Approximately 137,000 barrels per day are sold by the State of California and the Cities of Long Beach and Newport Beach. Union Oil Company of California stated that State and local government royalty interests constitute eight percent of its production under the leases in which it has an interest, with Federal interests accounting for another two percent.

The Independent Refiners Association of California submitted a survey of its 15 members showing that, during the week prior to the March 13 hearing, each of its 15 member refiners obtained 50 percent or more of its crude oil supplies from governmental sources, and some of the members obtained as much as 100 percent. Powerine Oil Company stated that it purchased 88 percent of its crude oil in February 1974 from State and local governments; approximately 32 percent of the crude oil refined by Toscopetro Corp. was government-owned crude; and the San Joaquin Refining Company currently purchases 84% of its crude oil from government sources.

When this supply data is combined with the dramatically increased prices for exempt crude oil, the magnitude of the impact that primarily is confined to a small group of independent refiners becomes apparent. Edgington Oil Company stated that if it were to pay the increase in price of exempt oil prices over prices for "old" domestic crude oil, the additional cost would be $75,000 per day, or $2,250,000 per month. Similarly,

San Joaquin Refining Company projected increased costs of $36,700 per day, or over $1 million each month if the exemption were reinstated.

State and local governments in California are seeking to charge the posted price for exempt crude oil, plus a bonus, with respect to some refiners for crude oil delivered since September 1973. San Joaquin Refining Company stated that if these prices were permitted, its liability for the six-month period through February 28, 1974, would approach $5 million, which would substantially exceed its total assets.

The California independent refiners stated that they would have to increase their prices for refined petroleum products if the State and local government crude oil were sold at the exempt prices. This would have a direct impact upon consumers. Toscopetro Corporation stated it would have to increase the price of the gasoline it produces by 2 to 5 cents per gallon; Beacon Oil Company stated it would be forced to add 4.7 cents per gallon to each petroleum product produced; and Lundy-Thagard Oil Company stated that it would have to increase the price of its asphalt products by $30 per ton. The Union Oil Company of California stated that removal of the exemption resulted in a saving to purchasers of its gasoline of 2 cents per gallon.

It remains true, as FEO pointed out in the preamble to the February 21, 1974 amendment, that "the quantity of crude oil being taken in kind and sold by State or local governments is a relatively small portion of the overall amount of crude oil being purchased in the United States." Nonetheless, the amounts that are involved are not insignificant and the impact upon purchasing refiners and ultimate consumers is magni-

fied by the price spread of about $5.00 per barrel between ceiling prices for old oil and uncontrolled prices for exempt oil.

3. *The exemption would create potential supply disruption.* FEO stated in the preamble to its February 21, 1974 amendment:

A further reason for eliminating the exemption is to eliminate the opportunity and incentive for State and local governments to seek to enter into agreements or arrangements regarding the sale of covered products which they would not otherwise enter into, and which would tend to result in further dislocations in the national distribution system which the Act seeks to preserve. For example, concern has been expressed that some States and local governments which have not done so to date have now begun to consider taking royalty oil in kind in order to reap the benefits of the sharply higher uncontrolled price of uncontrolled oil. This practice would tend to undermine existing supplier relationships and magnify the inflationary effects of the exemption. (31 FR 3176)

Although there was testimony that the ability of the States and local governments to sell in-kind royalty oil would not result in any significant disruption of the purchaser/supplier relationships contemplated by the Act, it is nevertheless apparent that there would be the potential for considerable disruption. According to information submitted by California, it is lessor in approximately 80 agreements that provide for in-kind royalty payments. If the State were free to sell this crude at exempt prices by auction to the highest bidder, a number of new supplier/purchaser relationships would occur and there would also be a disruption in the

price structure. Similar results could occur in Texas and Louisiana and in other states which did not submit comments but which either have authority now or could enact legislation authorizing them to take royalty oil in kind and auction it to the highest bidder.

The potential disruption is two-fold. First, it may have a significant impact on prices; second, it would complicate FEO's crude oil allocation program by disrupting existing supplier/purchaser relationships.

4. *The exemption should not be continued in order to finance State and local Governments.* In the preamble to its February 21, 1974 statement, FEO stated:

Certain government units have urged that removal of the exemption would deprive them of added revenues. FEO has concluded, however, that substantial additional revenues have already been realized by State and local governments from royalty crude oil due to the sale of crude oil at uncontrolled prices pursuant to the provisions of Subpart D of 10 CFR Part 212. The FEO believes that the still further revenues obtainable through the sale of crude oil at uncontrolled prices would represent, in effect, windfall revenues for those State and local governments having crude oil interests, at the expense of the adverse impact on the overall objectives of the Act * * * (31 FR 3176).

The affected State and local governments took strong exception to FEO's position on this issue. They argued strenuously that since the increased revenues are dedicated to public uses, particularly educational purposes, the exemption should be continued as a financing device for the public good. This argument has great popular appeal in the affected areas. The contrary view, however, is that since the price in-

creases resulting from reinstatement of the exemption would have interstate consequences, the effect would be to require consumers in other states to pay for public facilities in the producing states. Consumers Union addressed this point: "If producer states wish to raise increase revenue in order to build schools or expand other public programs, let them do so by raising taxes from those who will enjoy the benefits of such programs—their own citizens—rather then forcing consumers in other states to subsidize these programs from which they will not benefit through excessive prices and windfall profits. Even if there were some justification for increasing producer state revenues at the expense of consumers in other states (which there clearly is not), there is no assurance that the producer states would not simply use the additional revenues to reduce the taxes of their citizens, an outcome of dubious advantage to anyone other than the citizens of the producer states * * *."

The Lieutenant Governor of California, one of three members of the California State Lands Commission, took a position that was in opposition to the other two members and urged that state-owned crude oil should not be exempt from price regulations. He stated that price increases resulting from an exemption would be inflationary, that "[t]his increased revenue [to California] represents windfalls not planned for in the budget," and that "[t]he price increase passed to the consumer is equivalent to a tax passed arbitrarily and without consideration by either the legislature or the public."

FEO has concluded that raising revenues to support the public facilities of producer states is not an adequate rationale for reinstating the exemption

5. *Removal of the exemption will not create windfall profits for refiners.* Some of those in favor of the exemption have urged that its removal will result in a windfall for purchasers of crude oil, apparently in the belief that if the amounts reflecting the difference in price between "old" domestic crude oil and exempt crude oil delivered since December 1973 are not paid over to State and local governments, they will simply be retained as profits by the purchasers. However, under FEO pricing regulations applicable to refiners, only the refiner's actual added product cost for crude oil can be passed through in the form of price increases. To the extent that added product costs for crude oil are not incurred, no price increase is permitted; and to the extent that added product costs for crude oil are reduced, prices must be reduced. (10 CFR 212.82)

6. *Consideration of the proposal of the Joint Committee on Public Domain of the California Legislature is not appropriate in this proceeding.* The Joint Committee on Public Domain of the California Legislature proposes that California be subject to price controls on its sales of crude oil, but that the ceiling price be different in California than in other states. The Committee asserts that California 18°-19° gravity oil is selling for less per barrel than crude oil of the same gravity sells for in other parts of the United States, as a result of differences in the May 15, 1973 prices.

The Committee apparently believes that the differences in May 15, 1973 prices resulted either from inadequate State policies with respect to the administration of the State-owned oil fields and/or improper conduct by the major oil companies with respect to the posting of prices.

The FEO has concluded that this proceeding is not an appropriate one in which to address the issues raised by the Committee, particularly since this matter is apparently being actively pursued by the Committee in the California Legislature and in the courts. Also, neither the State of California nor any of the major oil companies have submitted comments with respect to the matter.

IV. *The amendment should be slightly modified.* Certain contracts between refiners and the State of California and the City of Long Beach for the sale of royalty oil that were in effect during the rulemaking process (October 25, 1973 through February 21, 1974) were awarded on the basis of competitive bids. These contracts provide, in general, that the price of the crude oil sold thereunder shall be the value determined in accordance with the valuation clause in the Field Contractors' Drilling and Operating Contract (which, in turn, is based on prices posted by the major oil companies that comprise the "Field Contractor") plus a bonus amount per barrel. These contracts were awarded to the independent refiners which submitted the highest bid with respect to the bonus amount per barrel. Under a provision of State law applicable to certain of these contracts, the sale of royalty oil to a party other than the Field Contractor could only take place if a bonus amount were bid. The law states, in pertinent part: "No bid shall be accepted, however, unless it is equal to or greater than the amount per barrel at which the field contractor accounts for like oil under the terms of the contractors' agreement." (Chapter 138, Section 3(e), Statutes of 1964, First Extraordinary Session.)

FEO does not intend to alter the basic contractual relationships between the parties to these royalty oil contracts any more than is necessary to implement the national objective of controlling the price of "covered products," including crude petroleum. Accordingly, the February 21, 1974 amendment is being altered so as to permit the payment of a bonus price per barrel in addition to the price for "old" domestic crude oil as determined under such contracts, during the period October 25, 1973 through February 21, 1974, in accordance with existing contracts for the sale of crude oil. All deliveries of crude oil by the State and the City of Long Beach after February 21, 1974 are subject to FEO price regulations, and the FEO regulations supersede, to the extent necessary, the price provisions of the contracts, but will preserve the existing supplier-purchaser relationships.

V. *Removal of Federal exemption.* The Federal Energy Office today is amending the price regulations to remove the exempt status for sales of covered products, including crude petroleum, by any Federal department, agency or other instrumentality. All sales on or after October 25, 1973, by any department, agency or other instrumentality of the Federal government are now subject to price regulations.

Many of those who participated in the rulemaking proceeding regarding the State and local government price exemption, either by an appearance at the public hearing, or by submission of written comments, raised objections to the price exempt status for sales of covered products by the Federal government, including some of the State and local government representatives, who urged that it would be inequitable

to subject State and local governments to price controls but not the Federal government. FEO has concluded that the considerations that support the removal of the exempt status for sales of covered products by State and local governments support and compel the removal of the exempt status for such sales by the Federal government.

Accordingly, 10 CFR 212.52(a) is deleted and all sales and deliveries of covered products by a Federal department, agency or other instrumentality made on or after 9 a.m., e.s.t., October 25, 1973, are subject to the price rules of 10 CFR, Part 212.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 92-159, E.O. 11748, 38 FR 33575; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 47, 39 FR 24)

In consideration of the foregoing, 10 CFR, Part 212, is amended as set forth below, effective immediately.

Issued in Washington, D.C., April 2, 1974.

JOHN C. SAWHILL,
Deputy Administrator,
Federal Energy Office.

1. Section 212.52 is revised to read as follows:

§ 212.52 Sales by Federal, State or local governments.

The prices charged for any sale, lease or lease-sale of a covered product by any Federal department, agency, or other instrumentality including any wholly owned Government corporation as defined in the Government Corporation Control Act of 1945, as amended,

and by State and local governments are subject to the price regulations of this part, except that, with respect to deliveries of crude oil made on or before February 21, 1974, a State or local governments may charge a bonus price per barrel of crude oil provided that such bonus price was stipulated in existing contracts and provided further that the balance of the price per barrel shall be based upon lawful prices charged for domestic crude oil subject to price regulation (including prices permitted to be charged pursuant to the special release rule in § 212.74 to the extent that new domestic crude oil is produced), and not upon prices charged for crude oil that is exempt from price regulation.

[FR Doc. 74-7914 Filed 4-2-74; 4:51 pm]

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
1. The rule-making proceedings	3
2. The district court proceedings	7
3. The court of appeals proceedings	8
Argument	9
Conclusion	14

CITATIONS

Cases:

Addison v. Holly Hill Co., 322 U.S. 607	12
National Labor Relations Board v. *Majestic Weaving Co.*, 355 F. 2d 854	12
Securities & Exchange Commission v. *Chenery Corp.*, 332 U.S. 194	11, 12

Statutes, regulations, and executive order:

Administrative Procedure Act, 5 U.S.C. 553	9, 14
Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 87 Stat. 27	2, 3
Section 203(a)(3)	4
Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627	2, 4

Statutes, regulations, and executive order—Continued — Page

Section 5(a) — 2

6 C.F.R. 150.54(a) — 3
6 C.F.R. 150.351, *et seq.* — 3
10 C.F.R. Part 212 — 5
10 C.F.R. 212.52(b) — 6
Executive Order 11748 (38 Fed. Reg. 33575) — 5

Miscellaneous:

38 Fed. Reg. 29618 — 4
38 Fed. Reg. 34414, *et seq.* — 5
38 Fed. Reg. 34434 — 5
39 Fed. Reg. 24 — 5
39 Fed. Reg. 744, *et seq.* — 5
39 Fed. Reg. 761 — 5
39 Fed. Reg. 1924 — 5, 6
39 Fed. Reg. 7176 — 6
39 Fed. Reg. 8996 — 7
39 Fed. Reg. 12252 — 7, 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-171

STATE OF LOUISIANA, PETITIONER

v.

JOHN C. SAWHILL, ET AL.

No. 74-181

THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

JOHN C. SAWHILL, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (California Pet. App. A, pp. 1-21; Louisiana Pet. App. D, pp. 33a-52a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1974.[1] The petitions for writs of

[1] The court of appeals' decision was rendered from the bench on July 26, 1974 (Louisiana Pet. App. C, p. 32a). The opinion and judgment were filed on August 12, 1974,

certiorari were filed on August 23 and August 26, 1974, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See Section 5(a), Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633.

QUESTIONS PRESENTED

1. Whether the Federal Energy Office terminated rule-making proceedings initiated by the Cost of Living Council thereby invalidating regulations removing the exemption from price controls for state and local government sales of petroleum and petroleum products.

2. Whether such regulations may be applied to transactions occurring before the date of adoption of the regulations, where the notice of proposed rule-making provided for an earlier effective date.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 87 Stat. 27, and the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627, are set forth in the Appendix to the petition filed by the State of California.

Regulations of the Cost of Living Council and the Federal Energy Office, the Executive Order delegating authority to the Federal Energy Office, and the delegation of authority from the Cost of Living

---

and on August 14, 1974, the judgment was modified to make its effective date July 26, 1974 (Louisiana Pet. App. E, p. 53a).

Council to the Federal Energy Office are also set forth in the Appendix to the California petition.

STATEMENT

The issues presented in this case concern the Federal Energy Office's withdrawal of the exemption from price controls of state and local government sales of petroleum and petroleum products. Petitioners do not challenge either the authority of the Federal Energy Office to withdraw the exemption or the merits of its decision to do so; rather, they contend that the regulations removing the exemption were invalid because of certain alleged procedural deficiencies. Since petitioners' primary claim relates to the procedures followed in adoption of the regulations, the events leading to the adoption are set forth in detail below.

1. The Rule-Making Proceedings

On August 9, 1973, the Cost of Living Council issued regulations generally exempting state and local governmental units from price controls under the Economic Stabilization Act. 6 C.F.R. 150.54(a) (38 Fed. Reg. 21601). This exemption was applicable to sales of petroleum and petroleum products which were otherwise subject to price controls. 6 C.F.R. 150.351, *et seq.*

The advent of the "October War" in the Middle East and the attendant boycott by Middle East countries of crude petroleum sales to the United States resulted in a contraction of available supplies

of crude petroleum. Fearing that these events would directly affect domestic prices for petroleum products, on October 25, 1973, the Cost of Living Council published a Notice of Proposed Rule-Making for the purpose of removing the exemption of state and local government sales of petroleum from price controls (38 Fed. Reg. 29618). Interested persons were invited to file written comments by November 24, 1973. The notice further stated that if the proposed regulation were adopted, it would be effective as of October 25, 1973, the date upon which the Notice was filed with the Federal Register.

On November 27, 1973, after the close of the period for receipt of comments but before action had been taken on the proposed regulation, Congress enacted the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627. The Act required the issuance of regulations to control prices and allocate supplies of petroleum products within 15 days of enactment.

On December 4, 1973, the President, pursuant to authority conferred by the Emergency Petroleum Allocation Act, created the Federal Energy Office (FEO), and delegated to it all authority vested in him by the Act. In addition, the President delegated to FEO the authority vested in him by Section 203 (a)(3) of the Economic Stabilization Act. The President also directed the Chairman of the Cost of Living Council (CLC) to delegate to the Administrator of FEO "such authority under the Economic Stabilization Act as may be necessary to carry out

the purposes of that Act with respect to energy matters." Executive Order 11748, 38 Fed. Reg. 33575.

On December 11, 1973, FEO issued proposed regulations as required by the Emergency Petroleum Allocation Act. 38 Fed. Reg. 34414, *et seq.* These proposed regulations simply adopted by reference the prevailing CLC price control regulations. See 38 Fed. Reg. 34434.

On December 26, CLC formally delegated its petroleum pricing authority, including the rule-making proceeding initiated on October 25, 1973, to the FEO (39 Fed. Reg. 24).

On December 27, the Federal Energy Office published revised Mandatory Fuel Allocation Regulations (39 Fed. Reg. 744, *et seq.*). The CLC price control regulations remained unchanged "except to the extent inconsistent with price regulations in this chapter" (39 Fed. Reg. 761). The new allocation regulations were to be implemented on January 15, 1974; the price rules were simply to remain in effect.

On January 14, 1974, the FEO issued revised Petroleum Allocation and Price Regulations (39 Fed. Reg. 1924, *et seq.*) which superseded the December 27, 1973 regulations. To avoid confusion, the new regulations were issued as a recodification so that newly-numbered provisions would not be confused with old proposals. Part 212 of the new regulations which concerned price regulations republished in full the existing Cost of Living Council regulations (39 Fed. Reg. 1924). The effect of republication was to transfer the petroleum pricing regulations from Title 6 of the Code of Federal Regulations (Economic

Stabilization) to Title 10 (Energy) so that "[p]ersons subject to the price and allocation regulations will now be able to have a single readily available source of information as to the rules established to govern this program" (39 Fed. Reg. 1924). Section 212.52(b) continued the state and local government exemption. Having completed the issuance of regulations as required by the Emergency Petroleum Allocation Act, the Federal Energy Office stated that "no specific future changes are currently anticipated * * *." *Ibid.*

On February 21, 1974, the FEO, acting on the rule-making proceedings initiated by the notice of October 25, 1973, announced the removal of the exemption from price controls for state and local governments effective October 25, 1973 (39 Fed. Reg. 7176). The FEO found that the exemption, if not removed, "would tend to have a disruptive impact on the national distribution system" (*ibid.*). It also became apparent from the comments received that

> * * * much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay the substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the Act, would not be adequately ac-

complished unless the exemption is removed. [*Id.* at 7177:]

On March 5, 1974, in response to objections from several states, the FEO issued a notice of proposed reconsideration of the February 21 decision (39 Fed. Reg. 8996). A hearing was scheduled for March 13, 1974, and the public was invited to submit written comments in lieu of or in addition to oral presentation until 5:00 p.m., March 15, 1974.

On March 13, 1974, the hearing was held at the offices of the Federal Energy Office in Washington, D.C. Representatives of the States of California, Louisiana and Texas appeared and submitted oral testimony. On April 2, 1974, the FEO found that the evidence submitted reconfirmed its February 21, 1974 decision to withdraw the exemption of State and local government sales of covered petroleum and petroleum products (39 Fed. Reg. 12252).

2. The District Court Proceedings

Petitioner State of California filed this action on March 13, 1974, the date on which the FEO held the hearing on the proposed reconsideration of removal of the exemption. Petitioner State of Louisiana was permitted to intervene and on March 20, 1974, the district court granted petitioners' application for a temporary restraining order prohibiting enforcement of price controls with respect to California and Louisiana.

On May 1, 1974, after the FEO had reconfirmed its determination to withdraw the exemption, the dis-

trict court held the withdrawal invalid (Louisiana Pet. App. A, pp. 1a-7a). The court found that the FEO had terminated the rule-making proceedings initiated by the Cost of Living Council when it republished regulations preserving the exemption on January 14, 1974 (*id.* at 3a). Alternatively, the court held that the removal of the exemption, even if otherwise valid, could not be applied retroactively (*id.* at 4a-6a). The district court's findings and conclusions in support of its opinion were subsequently filed on May 28, 1974 (Louisiana Pet. App. A, pp. 9a-28a).

3. The Court of Appeals Proceedings

The court of appeals granted the government's request for a stay of the district court's order pending appeal, and on July 26, 1974, after oral argument, the court of appeals, in a ruling from the bench, reversed. The court of appeals indicated that its opinion would be filed subsequently and further explained that this unusual procedure had been employed because the amount in controversy was increasing at the rate of $1.2 million per day and "[t]he legal uncertainty surrounding these payments is injurious to the interests of all parties as well as third party small independent refiners who have accrued potential liabilities to the states" (Louisiana Pet. App. D, p. 41a, n.17).

The court of appeals opinion was filed on August 12, 1974. The court held that the "intervening transfer of authority from CLC to FEO and the sub-

sequent republication of price control regulations by FEO in a different section of the Code of Federal Regulations * * *" did not terminate the rule-making proceeding (Louisiana Pet. App. D, p. 44a). With respect to the issue of possible retroactivity, the court found "the effective date * * * is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies" (*id.* at 50a).

ARGUMENT

1. Petitioners' primary contention is that the FEO's removal of the exemption from price controls of state and local government sales of petroleum products violated the notice and comment requirements of the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. 553. Specifically, petitioners contend that the FEO's issuance of regulations on January 14, 1974, terminated the rule-making proceedings initiated by the CLC on October 25, 1973, and thus, the February 21, 1974 decision to remove the exemption was made without publication of notice and opportunity for public comment as required by 5 U.S.C. 553.

This issue was resolved adversely to petitioners' contentions by the court of appeals. There is no occasion for further review of this narrow issue which arises from the peculiar facts of this case.

In any event the court of appeals correctly held that there was no termination of the rule-making proceedings initiated by CLC. As the court of appeals found (Louisiana Pet. App. D, p. 44a):

> In the republication of January 14, 1974, upon which appellees principally rely, there was no discussion of FEO's consideration of the exemption in question, nor was there incorporated a general statement of the purpose for the exemption on the theory that republication was intended as a determination of the rule-making proceeding.

The court of appeals recognized that the "unique circumstances" which required FEO to promulgate a "massively complex petroleum allocation scheme" had resulted in deferral of action on the exemption (*id.* at 45a), and the court concluded that FEO "was entitled to reasonable leeway in the gale of congressional deadline while it assumed charge of the regulatory structure before being required to complete the repair initiated by CLC" (*ibid.*).

The court of appeals noted that evidence of bad faith, unfairness, or unconscionable delay might justify a contrary result but that no such evidence had been offered in this case (Louisiana Pet. App. D, p. 45a). Petitioners' contention that they were entitled to assume that the rule-making proceeding had been abandoned is unsupported by the record; indeed, as the court of appeals found, the "claim of good faith reliance takes on a somewhat hollow, if not artful, sound in view of information elicited during oral argument that at no time prior to actual withdrawal of the exemption did any of [the petitioners] so much as inquire of the agency whether the rule-making proceeding looking toward the withdrawal of

the exemption had, indeed, been abandoned" (*id.* at 48a).[2]

2. Petitioners also maintain that, assuming the validity of the removal of the exemption, it cannot be applied retroactively (Louisiana Pet. 10-17; California Pet. 25-29). As the court of appeals noted, retroactivity claims typically involve absence of notice and here the CLC rule-making proceedings included notice that the removal of the exemption would, if adopted, apply to sales occurring after October 25, 1973. Since the removal of the exemption applies only to transactions occurring after the notice date, its application cannot be characterized as retroactive.

Even if, however, application of the removal to transactions occurring after the notice date is deemed retroactive, such an application is valid. In *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, this Court adopted the following general test with respect to the retroactive application of agency action (332 U.S. at 203):

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary

---

[2] Petitioners' suggestion that changed circumstances since the close of the period for comments in the rule-making proceeding vitiated the subsequent withdrawal of the exemption is also without merit. Petitioners were afforded an opportunity to submit comments on March 18, 1974, in the reconsideration hearing, and it is apparent that changed circumstances—such as the three-fold increase in the uncontrolled price of oil and the enactment of the Emergency Petroleum Allocation Act of 1973—confirmed the need for removal of the exemption. See 39 Fed. Reg. 12252.

> to a statutory design or to legal or equitable principles. If that mischief is greater than the ill effect of retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 620.[9]

The FEO found that the exemption created a disruptive impact on the national petroleum distribution system, injured the competitive position of small and independent refiners, and disrupted historic supply patterns—results which were contrary to the goals of the Emergency Petroleum Allocation Act. 39 Fed. Reg. 12252, *et seq.*

Petitioners do not challenge these findings; rather they assert simply that retroactive application would be unfair because it would deprive states of income which they would otherwise receive. Although petitioners will necessarily receive less than the uncontrolled price, they are treated no differently in this

---

[9] *Chenery* involved the retroactive application of an order entered in adjudicatory proceedings. The test adopted by this Court is, however, equally applicable to regulation, as shown in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, cited by this Court in *Chenery*.

Petitioner California's reliance on *National Labor Relations Board* v. *Majestic Weaving Co.*, 355 F.2d 854 (C.A. 2) is misplaced. *Majestic* merely recognizes the general rule that ordinarily rule-making rather than *ad hoc* adjudication should be utilized by agencies to establish new standards. Here the Federal Energy Office utilized its rule-making powers and while regulations are ordinarily given only prospective effect, as shown in the text, retroactive application is appropriate in circumstances such as those present in this case.

regard from other domestic producers of petroleum and petroleum products.

Moreover, the court of appeals' opinion indicates (Louisiana Pet. App. D, pp. 48a, 50a) and, we have been informed by the Federal Energy Administration, that since October 25, 1973, the states have billed customers at the uncontrolled price but, except for isolated instances, have collected only the controlled price.[4] Thus, the hardship which would arise upon the refund of previous collections of substantial sums is not present in this case.

If collection of the uncontrolled price billings were permitted, the goals of the Emergency Petroleum Allocation Act would be nullified; accordingly, the court of appeals properly upheld the application of FEO's removal of the exemption to transactions occurring after October 25, 1973.[5]

3. Finally, petitioners argue that the withdrawal of the exemption cannot be applied to transactions which occurred prior to the date of adoption of the regulation because the Federal Energy Office failed to

---

[4] Petitioner Louisiana asserts that "certain" amounts were collected at the uncontrolled price (Louisiana Pet. 17). The affidavit to this effect relied upon by Louisiana does not indicate the precise amount of such collections (see R. 139-142), and the record shows that a demand for payment at the uncontrolled price was not sent to Louisiana's customer until January 30, 1974 (R. 143). Thus, at best such payments, if any, were made only during the period January 30, 1974 to February 21, 1974.

[5] We have been informed by the Federal Energy Administration that accrued but uncollected billings at the uncontrolled price now exceed $250 million.

comply with the 30-day requirement of 5 U.S.C. 553 (d). Section 553(d) requires publication or service of a substantive rule "not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." The FEO rule contained no express finding of good cause; however, as the court of appeals found (Louisiana Pet. App. D, p. 50a):

> [F]rom the reasons and purposes * * * assigned for the withdrawal of the exemption itself, and the very nature of the entire proceeding in context with the Economic Stabilization Act and the Emergency Petroleum Allocation Act, the cogent reasons for the withdrawal of the exemption as of the date of the initial notice were quite obvious. Under such circumstances any flaw was at most purely technical, being neither prejudicial nor invalidating.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

ROBERT E. KOPP,
STANLEY D. ROSE,
BRUCE G. FORREST,
ALLEN W. HAUSMAN,
Attorneys.

OCTOBER 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 561731 57

SUBJECT INDEX

Page

Interest of Amici Curiae 1

Statement of the Case 3

I

The Decision of the Court of Appeals Was Correct 5

A. The Notice of Rule Making Was Not Terminated by Intervening Events 5

B. The Federal Energy Office Did Not Err in Making the Rule Effective October 25, 1973 9

C. The Court of Appeals Did Not Overturn the District Court's Findings of Fact 11

D. There Are Alternate Grounds in Support of the Court's Decision 11

II

There Is No Conflict of Decision 13

III

There Is No Important Question of Federal or State Law 13

IV

The Question Presented Is Unique and Not Likely to Recur 14

Conclusion 15

TABLE OF AUTHORITIES CITED

Case	Page
SEC v. Chenery, 332 U.S. 194 (1947)	10
Federal Register	
38 Federal Register, pp. 29618-19	3
38 Federal Register, pp. 33575-76	9
39 Federal Register, p. 24	3, 4, 9
39 Federal Register, p. 1924	8
39 Federal Register, p. 2254	2, 3, 14
39 Federal Register, p. 7176	3
39 Federal Register, pp. 7176-77	3, 10
39 Federal Register, p. 7177	2, 9, 14,
39 Federal Register, pp. 12252-53	8
39 Federal Register, pp. 12253-54	3, 9
Regulation	
Federal Energy Office Regulation, Sec. 11748	9
Federal Energy Office Regulation, Sec. 212.73	2
Rules	
Supreme Court of the United States Rules, Rule 19(b)	13
Statutes	
Administrative Procedure Act, Sec. 553(c)	12
Economic Stablization Act, Sec. 211(d)	12
Emergency Petroleum Allocation Act, Sec. 4(a)	12
Emergency Petroleum Allocation Act, Sec. 4(e)	12
Emergency Petroleum Allocation Act, Sec. 4(g)	12
Emergency Petroleum Allocation Act, Sec. 4(g)(2)	12
United States Code, Title 5, Sec. 553	6
United States Code, Title 5, Sec. 706	12
United States Code, Title 5, Sec. 706(2)	12

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-171
No. 74-181

STATE OF LOUISIANA,

Petitioner,

vs.

WILLIAM E. SIMON, *et al.*,

Respondents.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Lands Commission, *et al.*,

Plaintiffs-Petitioners,

vs.

JOHN C. SAWHILL, *et al.*,

Defendants-Respondents.

Brief of Amici Curiae in Opposition to Petition for Writ of Certiorari.

Interest of Amici Curiae.

Independent Oil Refiners Association of California, Inc., is a trade association representing 15 small independent refiners located in the State of California. Edgington Oil Company is a small independent refiner and a member of the association. These Amici have actively participated in the proceedings before the agency, the District Court, and the Court of Appeals.

The interest of the small independent refiner can be found in the findings made by the Federal Energy Office ("FEO") at the time it decided to adopt the rule in question. The FEO found, "It appears that much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay the substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the [Emergency Petroleum Allocation] Act, would not be adequately accomplished unless the exemption is removed." (39 F.R. 7177).

To illustrate the impact upon the independent refiner, a particular grade and gravity of crude oil which sold for $2.85 per barrel on May 15, 1973 (prior to Phase IV regulations) would now sell for $4.20 per barrel[1] if subject to price controls but would sell for about $9.20 per barrel[2] if exempt from price controls. The traditional role of the independent refiner and marketeer has been to sell at prices competitive to those of the major oil companies. The independent refiner could not continue to compete with the vertically integrated major oil companies if government-owned oil were exempt and therefore more than twice the price of oil obtained from private sources.

---

[1]FEO Regulation Section 212.73 allows a producer to charge $1.35 per barrel over the highest posted price on May 15, 1973, for that particular grade at that field.

[2]There is a price spread of about $5.00 per barrel between controlled prices and uncontrolled prices (39 F.R. 12254).

In the administrative proceedings for the adoption of the rule, the FEO specifically found: (1) The exemption would be harmful to the competitive position of independent refiners (39 F.R. 12252-54); (2) continuance of the exemption would result in windfall revenues for State and local governments (39 F.R. 7176, 39 F.R. 12254); and (3) removal of the exemption would not create windfall profits for refiners (39 F.R. 12254).[3]

Statement of the Case.

No dispute is presented regarding the substantive merits of the FEO rule withdrawing the State and local government exemption. The attack against it is directed purely to the procedure involved. Petitioners contend (and we dispute) that the rule of February 21, 1974 was invalid on the grounds: (1) that the Notice of October 25, 1973[4] had been constructively terminated prior to February 21, 1974, by intervening events, and (2) that the rule of February 21 could not legally be made effective October 25, 1973.

Petitioners' Statement of the Case needs amplification in several respects material to their contentions.

Petitioner California states (p. 10) that the CLC never took any action pursuant to the Notice of Octo-

---

[3]Federal price controls operate in such a manner as to prevent refiners from pocketing the cost savings as profits (39 F.R. 12254).

[4]On October 25, 1973, the Cost of Living Council ("CLC") issued a Notice of Proposed Rule Making, to be effective October 25, 1973, if adopted (38 F.R. 29618-19). On December 26, 1973, the CLC delegated to the newly created Federal Energy Office ("FEO") authority to act upon outstanding matters initiated by the CLC (39 F.R. 24). On February 21, 1974, the FEO adopted the proposed rule, effective as of October 25, 1973 (39 F.R. 7176-77).

ber 25, 1973. That is a true but incomplete statement. Petitioners neglect to include in their otherwise detailed Statement of the Case any reference to Delegation Order No. 47 (December 26, 1973)[5] by which the CLC delegated to the FEO its responsibility for price regulation of petroleum products and expressly confirmed and ratified "all orders, regulations, circulars or other directives issued and all other actions taken" by the CLC and provided that all such matters should remain in full force and effect unless or until altered, amended or revoked by the FEO.[6]

Petitioner State of California recites in its Statement of the Case (p. 11): "The summary preceding the January 14 regulations (39 F.R. 1924) stated '. . . no specific future changes [in the regulations] are currently anticipated,' but did invite comments upon the entire complex system for allocation and pricing set forth in the regulations." The partial sentence quoted by the State of California is taken out of context, and the reference to "allocation and pricing" is a bit of editorializing. The full text of this FEO announcement is set out in the Appendix to California's Petition, pages 96 to 98.[7] The significance of the out-of-context quote

---

[5]39 F.R. 24, January 2, 1974; App. to Calif. Pet., pp. 91-93.

[6]At a later point in its brief ("Argument", p. 15), petitioner State of California does refer generally to the transfer of authority, describing it as an intervening circumstance which would cause them to believe that the Notice had been terminated.

[7]Basically, the announcement recited the authority for the regulation, the recent history, the fact that there had been a substantial revision to the allocation provisions, that the price provisions previously incorporated by reference to CLC regulations were now recodified and set forth in the same title as the allocation regulations, followed by the specific sentences here referred to. "Due to the fact that a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will

and the editorializing is illustrated by the following discussion from the Opinion of the Court of Appeals (App. to Calif. Pet., pp. 15-16):

> "The appellees extract from the January 14, 1974, order the phrase '. . . although no specific future changes are currently anticipated . . .' and argue that this warranted the assumption on their part that the change contemplated by the pending rule making proceeding had been abandoned. This disregards the preceding sentence stating that 'a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise.' There had been a substantial revision as to allocation provisions but not as to prices."

I

The Decision of the Court of Appeals Was Correct.

A. The Notice of Rule Making Was Not Terminated by Intervening Events.

The first Question Presented by both Petitioners (Calif. Pet., p. 4; La. Pet., p. 3)[8] is their contention that the rule-making proceeding initiated by the Notice of October 25, 1973, was terminated on or before January 14, 1974, as a result of intervening circumstances.

---

surely arise, the Federal Energy Office is inviting comment on these regulations. Although no specific future changes are currently anticipated, the Federal Energy Office would appreciate all comments or suggestions which might assist in future changes to the program."

[8]Louisiana frames the first issue generally, in terms of whether or not the rule of February 21, 1974, was valid; but the underlying contention is the same. "It is the position of the State of Louisiana that the notice of October 25, 1973 was no longer viable when the FEO issued its rule of February 21, 1974." (Pet., p. 9.)

This issue was identified by the Court of Appeals (Opinion, p. 2) and Petitioner California (Pet., p. 14) as the decisive issue of the case; we concur.

Petitioners cite no legal authority for their proposition of an implied or constructive termination. Instead, they point to circumstances by which they "reasonably concluded" that the rule-making process was at end. For purposes of discussion below, we group these "intervening" circumstances cited by Petitioners as follows: (1) the four-month time interval between the Notice of October 25, 1973 and the Rule of February 21, 1974; (2) the FEO regulations and announcement of January 14, 1974; and (3) other circumstances.

Petitioners complain of the four-month time lag between the Notice of October 25, 1973 and the adoption of the rule on February 21, 1974, arguing in effect that the Notice expired with the passage of time. Petitioner State of Louisiana states the case as follows: "If this position were to be sustained then it would appear that an administrative agency could issue one Notice of proposed rule making and then issue rules based on that Notice for months and even years thereafter, a result which could of course not be sanctioned" (La. Pet., p. 7). The hyperbole helps to demonstrate the fallacy of their argument. "Years" are not involved; and we suggest that "months" are quite normal in an administrative rule-making process.[9] With respect to the four-month time period here in question, one month was consumed by the solicitation of comments (October 25, 1973, to November 24, 1973). Three days later, the Emergency Petroleum Allocation Act was enacted.

[9]The Administrative Procedure Act (5 U.S.C. § 553) requires notice and an opportunity to comment before the adoption of a regulation.

During the next one and one-half months plus (November 27, 1973 to January 14, 1974), working under a Congressional deadline, a new agency was formed and complex petroleum allocation regulations were developed and promulgated. Simply stated, the problem posed by Petitioners' contention is not present in this case. As to the general proposition of how long a notice of proposed rule making remains viable where the agency has not acted, the Court of Appeals stated:

> "No case has been called to our attention, nor can we find any, which applies a doctrine of constructive termination of a rule making proceeding after its express termination by final decision of the responsible agency with the result of reversing the effect of that express determination contrary to the findings and intent of the agency. This is not to say that under some circumstances bad faith, basic unfairness or unconscionable delay could not justify a different result. Such were not present here." (Opinion, pp. 13-14 of App. to Calif. Pet.).

Petitioners contend that the FEO actions of January 14, 1974, caused them to assume that the Notice of October 25, 1973 was no longer viable and that the FEO had made a final decision to retain the exemption (Calif., p. 11; La., pp. 9-10). Specifically, they point to the fact that the price regulations published on that date contained the exemption and the fact that the accompanying announcement stated in part, ". . . no specific future changes are currently anticipated . . ." (App. to Calif. Pet., pp. 96-98). The partial sentence they quote is out of context.[10] The regulations of

[10]Discussed *supra*, at note 7.

January 14 were based on a Notice of proposed rule making issued on December 12, 1973[11]—not on the Notice of October 25, 1973. On January 14, no mention was made of the Notice of October 25, 1973, or the subject matter thereof.[12] There was no discussion of the exemption, nor any other indication that the question of whether or not there should be an exemption had been considered or acted upon. The price regulations were described only as a republication of the regulations in a different section of the Code for convenience. The States did not inquire of the agency whether the rule-making proceeding had been abandoned (Opinion, p. 16 of App. to Calif. Pet.). When their "assumption" was subsequently brought to the attention of the FEO, the agency stated that it did not, on January 14, 1974, intend to act upon the Notice of October 25, 1973 (39 F.R. 12252-53).

The other intervening circumstances alleged by Petitioners, including the adoption of the Emergency Petroleum Allocation Act and an increase in the disparity between ceiling and exempt prices, were circumstances which weakened rather than strengthened the position of Petitioners that the exemption should be continued.[13] In its rulings of February 21, 1974, and April 2, 1974, these were circumstances cited by the

---

[11]"The purpose of this amendment is to revise Chapter II of Title 10 of the Code of Federal Regulations. A notice of proposed rulemaking containing a Proposed Mandatory Petroleum Products Allocation Program was issued on December 12, 1973." (39 F.R. 1924).

[12]The first time after its issuance that the Notice of October 25, 1973 was mentioned was on February 21, 1974, when the FEO expressly cited it as authority for the adoption of the rule of that date.

[13]Discussed in Opinion (p. 15, App. to Calif. Pet.).

FEO as reasons for the removal of the exemption.[14] The transfer of authority from the CLC to the FEO, cited by California at page 15 as a circumstance which caused them to believe that the Notice had been terminated, contained an express provision that outstanding matters were not terminated by the transfer.[15]

B. The Federal Energy Office Did Not Err in Making the Rule Effective October 25, 1973.

When the FEO adopted the rule on February 21, 1974, they made it effective as of October 25, 1973. Both Petitioners contend (Calif. Question 3, p. 4; La. Question III, p. 3) that this was retroactive rule making and therefore invalid, citing cases regarding retroactive rule making.

But we are not concerned with retroactivity in the usual sense. It is on this basis that the cases cited by Petitioners are distinguishable. Involved here were prices which from the very inception of the rule-making pro-

---

[14]One of the specific purposes of the Emergency Petroleum Allocation Act was to protect the competitive viability of the independent refiner and marketeer (39 F.R. 7177); the disparity between ceiling and exempt prices meant that a class of refiners purchasing predominantly exempt oil from the states would not be able to compete effectively with major oil companies owning or controlling large amounts of private, price-controlled oil (39 F.R. 12253-54).

[15]The transfer of authority was accomplished by two documents. On December 4, 1973, E.O. 11748 (38 F.R. 33575-76, Dec. 6, 1973) established the FEO, delegated to it authority under the EPAA and the ESA, and directed further delegations of authority from the CLC to the FEO. On December 26, 1973 (Delegation Order No. 47, 39 F.R. 24, January 2, 1974), the CLC delegated to the FEO its responsibility for price regulation of petroleum products and expressly confirmed and ratified "all orders, regulations, circulars and other directives issued and all other actions taken" by the CLC and provided that all such matters should remain in full force and effect unless or until altered, amended or revoked by the FEO.

ceeding could be regarded as conditional. The rule-making process was an ongoing one and the October 25, 1973, Notice clearly stated that the change, if made, would be effective as of said date.

Assuming that there was retroactive application, the rule still does not necessarily fail. The Court of Appeals, citing the "balancing" test of *SEC v. Chenery*, 332 U.S. 194 (1947),[16] held that this was not the type of retroactivity condemned by law. Typical retroactivity questioned but accepted in the cases has involved situations where there was no advance notice, unlike the situation involved here. This situation involves few, if any, of the problems of retroactive regulation generally. "In any event, the effective date of the rule in question is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies." (Opinion, p. 18, of App. to Calif. Pet.).

With respect to the "30 day" argument raised by Petitioners (Calif. Pet., pp. 23-24; La. Pet., pp. 10-11), the Court of Appeals held that there were cogent reasons for the withdrawal of the exemption as of the date of the Notice (Opinion, pp. 18-19 of App. to Calif. Pet.). In its ruling of February 21, 1974, the FEO made specific findings regarding the adverse impact of the exemption upon the national distribution system and stated that the rule was made effective that date because the Notice of October 25, 1973, had explicitly provided that the rule, if ultimately adopted, would apply to all deliveries occurring after that date (39 F.R. 7176-77).

[16] "[R]etroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." 332 U.S., at 203.

C. The Court of Appeals Did Not Overturn the District Court's Findings of Fact.

Petitioner State of Louisiana contends (pp. 18-19) that the Court of Appeals overturned the District Court's Findings of Fact. Throughout these proceedings in both courts, there has been no dispute as to the facts[17]—only as to the legal conclusions to be drawn from uncontested facts. The so-called "Findings of Fact" were prepared by Petitioner's attorneys at the direction of the District Court.[18] The Court of Appeals stated, "Where they are in conflict with the views herein expressed they are either not findings of fact at all, or mixed findings of fact and conclusions of law made under an erroneous view of controlling law, as to which the effect of the clearly erroneous rule is dissipated. [Citing cases]" (Opinion, p. 20 of App. to Calif. Pet.).

D. There Are Alternate Grounds in Support of the Court's Decision.

Before the Court of Appeals, these Amici asserted alternate grounds in support of the Court's ultimate decision. The Court reserved ruling on them in view of its ruling that the termination of the exemption by the FEO was valid (Opinion, note 5, at p. 4 of App. to Calif. Pet.).

These alternate grounds in support of its decision which the Temporary Emergency Court of Appeals did not rule upon were basically as follows. Even if the

---

[17]The injunction granted by the District Court was based on uncontroverted affidavits; there was no formal trial (Opinion, p. 9 of App. to Calif. Pet.).

[18]District Court Opinion, p. 28 of App. to Calif. Pet.

termination of the exemption were invalid, the rule of January 14, insofar as it purported to exempt State and local governments from price controls, was itself invalid: (1) because the announcement of January 14 did not contain a concise general statement of the basis and purpose for the exemption, as required by Section 553(c) of the Administrative Procedure Act; and (2) because subsections (a), (e), and (g) of Section 4 of the Emergency Petroleum Allocation Act preclude any exemptions to the regulations other than those provided in 4(e)[19] or those added by the amendment procedure of 4(g)(2), a procedure which was not followed.[20]

In further support of the Court's decision, subsection (d) of Section 211 ("Judicial Review") of the Economic Stabilization Act provides that no regulation of the CLC or the FEO shall be set aside unless a final judgment determines that the regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in Section 706(2) of Title 5, U.S. Code. Section 706 does allow a court to set aside an agency regulation on procedural grounds, but it also provides that in so doing, the reviewing court shall take due account of the rule of "harmless error". Thus, even if the Notice of October 25 had been terminated, the error was harmless in view of the opportunities afforded to Petitioners to submit their comments, both before and after the

---

[19]Section 4(a) provides that the price regulations shall apply to all sales of crude oil except as provided in subsection (e). Subsection (e) provides for one mandatory and one discretionary exemption, neither of which is applicable here.

[20]Even if available, the amendment procedure of 4(g)(2) requires a series of findings by the agency and a period of review by Congress before the exemption can become effective.

rule of February 21, 1974.[21] The Court of Appeals, having determined that the Notice had not been terminated, stated that it was not necessary to rule upon this contention (Opinion, p. 11 of App. to Calif. Pet.).

II

There Is No Conflict of Decision.

There is no conflict of decision on the issues here involved, *i.e.*, whether or not the Notice of rule making had been terminated, and whether or not the regulation was unlawfully retroactive.

Petitioner California (Pet., p. 4) cites only a conflict in principle, *i.e.*, an alleged "conflict with the decisions of this Court and other Federal Courts in its interpretation of the fundamental rights conferred upon those affected by administrative regulations under the Administrative Procedure Act."

At page 6, Petitioner Louisiana alleges that this decision is in conflict with other decisions of other Federal Courts of Appeals and of the United States Supreme Court. Significantly, they do not cite the other cases alleged to be in conflict.

III

There Is No Important Question of Federal or State Law.

Petitioner Louisiana (Pet., p. 6) alleges, "Moreover, the case involves an important state question as well as an important question of federal law which has not been, but should be settled by this Court, all within the contemplation of Rule 19(b) of the rules of this

[21] In a different context, the Court of Appeals said, "There is simply no indication that any significant arguments were withheld or disregarded or that the appellees were unfairly treated." (Opinion, pp. 16-17).

Honorable Court." They do not identify, and we are unable to locate in either petition, the important question of federal or state law.

Both Petitioners (Calif. Pet., p. 4; La. Pet., p. 21) do allege the importance of the issue in terms of the dollar amount of the revenues lost by the states because their exemption was not continued. The Temporary Emergency Court of Appeals stated (Opinion, p. 16), "On no theory did appellees have a vested right to a continuation of the preferential treatment." These oil producing states, like other private producers of crude oil, already receive $1.35 per barrel more for their oil than they received prior to the imposition of the Phase IV price controls. At issue is an additional $5.00 per barrel surcharge which the FEO found would represent "windfall revenues" to these states.[21]

IV

The Question Presented Is Unique and Not Likely to Recur.

Petitioner State of California prefaces its description of the Questions Presented with, "Because of the unique character of this case, a short general summary of the facts is necessary to convey the significance of these specific questions presented for review." (p. 2).

---

[21]"Certain government units have urged that removal of the exemption would deprive them of added revenues. The FEO has concluded, however, that substantial additional revenues have already been realized by State and local governments from royalty crude oil due to the increases in the crude oil ceiling prices pursuant to the provisions of Subpart D of 10 CFR Part 212. The FEO believes that the still further revenues obtainable through the sale of crude oil at uncontrolled prices would represent, in effect, windfall revenues for those State and local governments having crude oil interests, at the expense of the adverse impact on the overall objectives of Act, as discussed above." 39 F.R. 7177. By contrast, the FEO found that the elimination of the exemption would not result in windfall profits to refiners. 39 F.R. 12254.

One and one-half pages later, Petitioner State of California then frames its first Question as "1. Whether, *under the aforesaid circumstances,* the Federal Energy Office had already terminated the rule making process (etc.) . . ." (Emphasis added).

This narrow issue is the one identified by the Court of Appeals (Opinion, p. 2 of App. to Calif. Pet.) and Petitioner State of California (Pet., p. 14) as the decisive issue of the case.

The Court of Appeals stated, "We think the appellants are right in saying that but for unique circumstances which caused FEO to promulgate a massively complex allocation scheme and hold the issue of State and local government price exemption in abeyance until the issues could be approached in a conscientious manner, this controversy never would have arisen." (Opinion, p. 13 of App. to Calif. Pet.).

Where the question presented is unique on its facts and not likely to recur, its precedent-setting value is minimal, and this is a further reason why this Court should deny the Petitions for Writ of Certiorari.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD A. DEL GUERCIO,
JAMES R. JURECKA,
JOSEPH A. HELYER,
Attorneys for Amici Curiae Edgington Oil Company and Independent Refiners Association of California, Inc.

Of Counsel:
DEMETRIOU & DEL GUERCIO